89-407

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, A Professional Corporation,

Petitioners,

v.

STATE OF ALASKA; SUPERIOR COURT for the STATE OF ALASKA, Third Judicial District,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

WEIDNER & ASSOCIATES, INC.
A Professional Corporation
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August 31, 1989

I.

QUESTIONS PRESENTED FOR REVIEW

1. May an attorney be compelled to reveal confidential attorney/client communications to defend himself at the same time he is defending his client for first degree murder where a conflict of interest would force the attorney to violate the Sixth Amendment right to effective assistance of counsel, and the Fifth Amendment right to remain silent and against self incrimination?

2. Whether excessive, non-remedial, civil penalties imposed solely for retributive and deterrent purposes on an attorney constitute punishment for due process purposes such that the sanctions may not be summarily imposed without a prior jury verdict and other constitutional safeguards pursuant to the United States Supreme Court decisions in U.S. v. Halper, 57 U.S.L.W. 4526 (No. 81-1383 May 15, 1989), and Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963), and Bell v. Wolfish, 441 U.S. 5d20, 539 n. 20 (1979)?

3. Where an attorney is fined thousands of dollars for cross-examination while defending a client for first degree murder, does the invidious discrimination of relegating criminal defense counsel to a second class status deny equal protection and due process of law in light of the right to practice law, to effective assistance of counsel, and to cross examination and confrontation since attorneys in civil cases have direct appeal rights to the Alaska Supreme Court from sanctions, while attorneys defending litigants in criminal cases have only a discretionary right of review to the Alaska Supreme Court?

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PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, A PROFESSIONAL CORPORATION,

Petitioners,

vs.

STATE OF ALASKA; SUPERIOR COURT FOR THE STATE OF ALASKA, Third Judicial District,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

TO: THE HONORABLE CHIEF JUSTICE WILLIAM H. REHNQUIST AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners; Phillip Paul Weidner and Drathman & Weidner, A Professional Corporation, respectfully pray that a Writ of Certiorari issue to review the final opinion of the Court of Appeals of the State of Alaska entered in this preceeding on November 25, 1988.

II.

OPINION BELOW

The Alaska Supreme Court denied a Petition for Hearing in Phillip Paul Weidner and Drathman & Weidner, A Professional Corporation, Petitioners v. State of Alaska, Respondent File No. S-3186 on May 3, 1989 (Exhibit A in Appendix herewith), in an unreported order. The Court of Appeals for the State of Alaska affirmed the imposition of sanctions, in part, against petitioners, on petitioners' appeal from thousands of dollars in fines levied against petitioners during the defense of Daniel Mozzetti, in Phillip Paul Weidner and Drathman & Weidner v. State of Alaska; Superior Court for the State of Alaska , Third Judicial District, Slip Opinion No. 871, File No. A-420, on November 25, 1988 (Exhibit B in Appendix herewith). The case is reported at 764 P.2d 717. The Court of Appeals denied a Petition for Rehearing on January 5, 1989 (Exhibit C in Appendix herewith).

III.

JURISDICTION

The entry of Final Judgment of the Supreme Court/Court of Appeals of the State of Alaska was effective on May 3, 1989, as reflected by the file stamp on the final order by the Alaska Supreme Court denying a Petition for Hearing in the Alaska Supreme Court No. S-3186 (Exhibit A in Appendix herewith).

A final opinion of the Court of Appeals of the State of Alaska was entered on January 5, 1989 denying petitioners' request for a Rehearing. (Exhibit C in Appendix herewith). Pursuant to Alaska Supreme Court Rules of Appellate Procedure 302 et seq., a timely Petition for Hearing in the Alaska Supreme Court was filed on March 28, 1989. Jurisdiction is invoked under 28 U.S.C. § 1257 (3) and Rules 17 to 20 of the United States Supreme Court Rules of Appellate Procedure. The instant petition is timely filed under Supreme Court Rule 20 since filed within 90 days after the effective date of the Entry of Judgment of the

Alaska Supreme Court and the Alaska Court of Appeals.

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to due process, the right to effective assistance of counsel, the right to a jury trial, the right to remain silent and against self-incrimination, and the right to equal protection under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I Sections 3, 7, and 11 of the Alaska Constitution.

Summary contempt power is authorized by Alaska Rule of Civil Procedure 90, and civil penalties may be authorized under Alaska Rule of Civil Procedure 95.

The case likewise involves the right to review to the Alaska Supreme Court by criminal defense counsel sanctioned in criminal cases. Alaska Statutes 22.05.010, 22.05.015, 22.05.020, and 22.07.020(a)(1)(B).

The text of said constitutional provisions, rules and statutes are set out in the Appendix herewith pursuant to United States Supreme Court Rule 21(f) and 21(k) (Exhibit G in Appendix herewith).

V.

STATEMENT OF THE CASE

Petitioner Phillip Paul Weidner, a private attorney, and a partner in petitioner Drathman & Weidner, A Professional Corporation, was appointed by court order to represent Daniel Mozzetti, also known as Donald Stumpf, with regard to first degree murder since Mr. Mozzetti was indigent. There were consistent allegations made by the prosecution, largely unsupported by the evidence, that Mr. Mozzetti, also known as Mr. Stumpf, had killed one Hui Yi pursuant to an alleged "contract" at the request of one Thomas Shin.[1]

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1. Mr. Mozzetti, in large part due to the severe restrictions on cross-examination and confrontation, and errors with regard to the purported "co-conspirator exception" was convicted after jury trial and sentenced to 99 years

Between July 28, 1983, and September 21, 1983, the court issued numerous purported contempt citations fining Mr. Weidner in an amount in excess of $5,000 and threatening him repeatedly, pursuant to the prosecution's applications, with imprisonment.

Most of the fines were imposed because of the court's insistence that counsel must reveal a "good faith basis" for cross-examination of crucial prosecution witnesses as to their motive for bias. Counsel would refuse to violate confidential communications from Mr. Mozzetti, citing the Sixth Amendment to the United States Constitution and Article I, Section 11 of the Alaska Constitution, and the Fifth Amendment to the United States Constitution and Article I, Section 9

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imprisonment. A Petition for Writ of Certiorari was filed for Mr. Mozzetti in Stumpf v. State, Case No: 88-6719. The Petition for Writ of Certiorari was denied. Mr. Mozzetti is proceeding on his own for Habeas Corpus relief in federal court such that the issues concerning his confidential comments to Mr. Weidner vis a vis the Fifth and Sixth Amendments are not yet moot.

of the Alaska Constitution. The court would then summarily impose contempt citations without affording Mr. Weidner a full and adequate, independent right to defend himself through independent counsel, free from any conflict of interest.

It is vitally important for this court to realize that the applications by the prosecution for sanctions, and the orders by the court, constituted a concerted effort to chill Mr. Mozzetti's rights to confrontation and cross-examination, and further to invade the attorney-client privilege and the right to remain silent and against self-incrimination.

With regard to the central issue, namely the requirement of providing a "good faith basis" for questions on cross-examination, it is important for the court to realize that counsel was faced with the reality that if he provided a basis for his questions in open court, he would alert the prosecution to substantial damaging information regarding his client, said information protected under the applicable constitutional privileges, and that even if

he did so in an ex parte, in camera manner that the court had indicated by its previous actions that confidentiality would not be maintained.

Thus, the central issues in the instant appeal involve attempts to restrict the defendant's rights to confrontation and cross-examination, require disclosure of attorney-client confidences, and impose on the defendant's right to a fair trial through the threat of imprisonment of defense counsel and the threat of an imposition on same of extreme monetary sanctions without affording the attorney full rights to notice, to a hearing, a jury trial, a hearing before a judge, to call witnesses, to confrontation and cross-examination, to discovery, due process, the advice and assistance of independent counsel, and the opportunity to exercise said constitutional and statutory rights without a conflict of interest existing as to the necessity of defending his client and maintaining the integrity of the attorney-client relationship.

These issues are intimately intertwined with the necessity of preserving attorney-client

confidences and the rights to remain silent and against self incrimination under the United States and Alaska Constitutions prior to termination of jeopardy as to both federal and state exposure for first degree murder and for first degree murder pursuant to an alleged contract killing.

A. THE SANCTIONS OF JULY 28, 1983.

The prosecution was attempting to prove that Mr. Mozzetti had purportedly yelled certain instructions to a state witness, one Barry Nix, regarding the witness, Dennis Brown, while they both were in the "holding cells" awaiting court, and to do so they called a trooper, Greg Olson. [Tr. 4051]. In direct violation of Criminal Rule 16, Judge Ripley refused to allow Mr. Weidner access to a written police report from Mr. Olson (who claimed that he recognized Mr. Mozzetti's voice). The court repeatedly refused to allow defense counsel access to the written police report, despite counsel's objection to cross-examining the witness without the police report. [Tr. 4084-4087]. The judge then ordered the cross-examination terminated and

excused the witness. [Tr. 4087]. Mr. Weidner objected to the exclusion of the witness from testimony without access to the police report and to the court allowing the witness to leave town for two weeks. [Tr. 4087].

The jury was excused and Judge Ripley then realized his error and allowed counsel access to the police report [Tr. 4090-4096], and in fact realized that he had summarily violated Rule 16 and released a witness over objection [Tr. 4102-4103]. The court nonetheless fined Mr. Weidner, finding he had violated its direct orders to move on to another area, and specifically denied any application for written motions for sanctions by the prosecution or a hearing before another judge, or an appropriate right to defend. [Tr. 4104-4105].

The second sanction on July 28, 1983, occurred when the witness Flabiano M. Macon was called in an effort to bolster the state's position that Sherry Schroeder was a "babysitter" at Tr. 4243. Mr. Macon maintained that he still owed Ms. Schroeder money for babysitting and had only

known her as a babysitter. At Tr. 4234, he was asked if he had ever met her while she was working at the Moral Destiny. While the court had previously allowed Mr. Weidner to inquire as to other witnesses about the "Moral Destiny", and Ms. Schroeder's activities therein, when Mr. Macon was asked this question the prosecution moved for contempt.

Despite the fact that there had never been any prior specific orders precluding questions about Ms. Schroeder meeting Mr. Macon at the "Moral Destiny," the court found that this was a violation of the order requiring cross-examination as to character evidence to be presented in advance in writing and imposed a fine of $400 refusing an independent hearing and refusing Mr. Weidner's explanation [Tr. 4246] that the questions were relevant as to the ongoing relationship between Mr. Macon and Ms. Schroeder despite the fact that Mr. Macon was contending that they had met over babysitting. The court refused to accept counsel's representations that he had a good faith basis for

asking the questions, and further refused to respect counsel's assertation that it would invade his attorney-client confidences to further reveal the basis. [Tr. 4246, 4247].

B. THE SANCTIONS OF AUGUST 2, 1983.

The prosecution, after extensive argument, obtained an order precluding defense counsel from cross-examining the witness, Barbara Hester, as to statements made by Mr. Mozzetti which the prosecution maintained were exculpatory, citing State v. Agoney, 608 P.2d 762 (Alaska 1980).

Over extensive argument and objection by defense counsel, the court ordered:

> Cross examination can be had only as to those conversations which the state opened up. And any matters suggested to the witness by way of question or otherwise -- and it would only be by question I guess, must relate to the subject matter of those conversations that the state opened up. I believe that's a rule in accord with Agoney and it's not a blanket order.

Tr. 2826-2827.

After cross-examination of Ms. Hester was complete, Mr. Gruenstein moved for sanctions, maintaining that where Mr. Weidner asked Ms. Hester words to the effect, "Were you trying to get him (i.e. Mr. Mozzetti) to make admissions?" and further asked, "Were you successful?" that this violated a protective order. [Tr. 4626]. Further a motion for sanctions was made as to Mr. Weidner's questions about Ms. Hester telling Mr. Mozzetti about the police coming around, alleging that there had been no prior offer of proof at the bench as to the conversations. Mr. Weidner refused to defend himself at the same time as he was defending his client and indicated that he had, in good faith, gone into areas opened up by the prosecution, that the orders were vague, and that there was no specific notice on any application for sanctions. [Tr. 4627]. He further asked for a specific hearing on the charges.

The court denied the applications for specific notice, denied the applications for hearing, and fined Mr. Weidner $100 per incident, for a total of

$200. [Tr. 4628]. Mr. Weidner specifically asked for a hearing and due process rights, and the application was denied. [Tr. 4629].[2]

C. THE SANCTIONS OF AUGUST 17, 1983.

The witness Gerald Parent was a crucial witness against Mr. Mozzetti since he was alleged to have sold Mr. Mozzetti the purported murder weapon. Based upon conversations with Mr. Parent's attorney, Mr. Griffin, Mr. Weidner asked Mr. Parent whether he had motive for bias. Specifically at Tr. 6553, he asked him:

> Q All right. Now, you've testified that they haven't made you any promises in this case?
>
> A That's correct.
>
> Q All right. Hasn't -- hasn't your attorney told . . . [him] . . . that they have told you that they won't prosecute you for hindering prosecution if you tell the same

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2. Sanction No. 5 (August 16, 1983), Sanction No. 7 (August 24, 1983), and Sanction No. 10 (September 13, 1983), were reversed or remanded for further proceedings by the Alaska Court of Appeals so they will not be discussed here.

version to this jury that you told to the grand jury?

The prosecution moved for sanctions, claiming that this was unprofessional conduct. The jury was not allowed to hear the answer to the question, and a hearing was conducted out of the presence of the jury with sworn testimony taken from Robert Griffin. [Tr. 6557-6566]. It was established that Mr. Griffin had, in fact, had a phone conversation with Mr. Weidner; that Mr. Parent had lied to the police in connection with his initial statement [Tr. 6562]; and that Mr. Griffin had told Mr. Parent that he was not going to be prosecuted for perjury if he told the truth [Tr. 6563]. Further, Mr. Griffin conceded at Tr. 6565 that he suspected that the prosecution, in telling Mr. Griffin that his client had to tell the truth, meant that he had to tell the version that he told to the Grand Jury as opposed to the first statement to the police.

Q Do you remember me asking you what do they mean -- that is, what did the prosecution mean when they said that the man had to tell the

truth, and you said, well, I think they mean what he told to the grand jury?

A You asked me -- yeah, I remember you asked me that question, and I -- and I remember saying -- we -- we talked about -- we -- I didn't know what -- what they meant by the truth, but I suspected what they meant.

Q And what did you tell me they suspected -- you suspected they meant?

A I told you I suspected they meant what they were -- what he -- the version he gave to the grand jury.

Tr. 6565 - 6566.

Despite the fact that the court recognized the significance of Mr. Griffin's admission that his client was expected to adhere to the Grand Jury version [Tr. 6570], Judge Ripley summarily fined Mr. Weidner $500 without a further hearing or right to independent counsel, claiming that the conduct was in violation of Evidence Rule 103.

D. THE SANCTIONS OF AUGUST 26, 1983.

The witness William Dublin was called as an "alibi" witness for Donald Smith. Evidence existed

that Smith may have had a motive to kill Yi [Tr. 4786, 4796, and 4798], and that further he may have had foreknowledge of the killing. Further, there was an indication that Mr. Smith may have had knowledge of Mr. Yi's death prior to it actually being reported in the newspapers and/or on the radio so as to indicate he was involved in the murder.

After obtaining certain protective orders over objection with regard to statements made by Mr. Smith to Mr. Dublin alleging hearsay, the prosecution then opened the areas up by calling Dublin as an alibi witness who claimed that he was Smith's roommate and that Smith slept in their home in Kotzebue on the nights of December 29 and 30. Through cross-examination, Mr. Weidner asked how Mr. Dublin could remember the nights in question [Tr. 7992], and Mr. Dublin testified that Mr. Smith had woken him up in connection with a phone call about the killings.

> MR. WEIDNER: He put the witness on the stand. He's got to live with it. He asked him the questions. I can test his perception of why he says it's the 29th and the 30th. Now, he's trying to establish an alibi for this man. I get to cross examine the man.

The prosecution moved for sanctions [Tr. 7995], claiming that Mr. Weidner was attempting to illicit hearsay in violation of the court's orders despite the fact that Mr. Weidner indicated he was simply asking questions, not for the truth of the matter asserted, but to establish the witness's perception as to the dates in question [Tr. 8000, 8004]. Despite a request by defense counsel to clarify the court's orders, the orders were not properly clarified. [Tr. 7997]. Mr. Weidner specifically indicated to the court why he needed to examine as to the statements in order to test the perceptions as to the 29th and 30th. [Tr. 8000]. Nonetheless, the court ordered Mr. Weidner not to refer to any purported hearsay statements. [Tr. 8005]. Further, counsel attempted to examine as to Mr. Smith's

demeanor when told that Mr. Yi had been killed. [Tr. 8016].

Despite the fact that counsel repeatedly approached the bench and made application as to certain questions, e.g. Tr. 8017, et seq., the court ruled that Mr. Weidner had been attempting to use certain questions as a "springboard" into an area that was denied. [Tr. 8042]. Mr. Weidner specifically asked for a separate hearing, separate counsel, the right to defend himself, and specific notice of what questions were objectionable, and the court refused to give said specific notice [Tr. 8042], and imposed sanctions in the amount of $250.

E. THE SANCTIONS OF SEPTEMBER 6, 1983.

The widow of the deceased, Mrs. Yi, was asked by Mr. Weidner as to whether she had consulted an attorney about a divorce action not long before Mr. Yi's death.

Despite the fact that counsel made a specific showing in camera as to the specific representations that had been made to him by another member of the Bar in the Anchorage area to this effect, Judge

Ripley fined defense counsel $500 since counsel refused to reveal the name of the attorney who did so. Note that to do so would have jeopardized counsel's sources, since in all likelihood Mrs. Yi would have taken action against the attorney that revealed the disclosure for purported violations of her own confidences. [Tr. 8760].

F. THE SANCTIONS OF SEPTEMBER 14, 1983.

The witness Roseann Dietz, who gave testimony substantially damaging to the prosecution was arrested on a bench warrant right after her testimony.

Mr. Weidner established this fact in cross-examining Investigator Grimes [Tr. 9661, 9683] and the prosecution moved for $500 in sanctions [Tr. 9676]. The prosecution maintained there was no good faith basis to show that the arrest was in any way linked to her testimony in this case. [Tr. 9676].

Mr. Weidner asked for an opportunity for independent counsel and opportunity to defend himself free from a conflict with his client so he did not have to violate attorney-client confidences and

reveal non-discoverable defense information. [Tr. 9678]. Further, he asked for an opportunity for an ex parte, in camera showing as to his offer of proof with regard to the relevance of the question, and that was likewise denied at Tr. 9679. Moreover, he indicated that it was relevant since it shows that the prosecution was arresting witnesses whose testimony was harmful to them, i.e. Theresa Campbell and Ms. Dietz, and was allowing Mr. Andreas to walk around as a free man on his 162 counts of perjury. [Tr. 9680].

The court, claiming that the question was a violation of the "prior bad act" order as to the witness Dietz, imposed sanctions in the amount of $500. [Tr. 9681].

G. THE SANCTIONS OF SEPTEMBER 21, 1983.

The witness William Hendricks testified to incriminating statements he claimed Mr. Mozzetti made while Mr. Hendricks was incarcerated with him. [Tr. 10402-10405]. Mr. Hendricks was in jail following his arrest on a Class A felony of sexual assault in the first degree and the charge was later

dismissed. [Tr. 10117-118]. While it was clear that the nature of the pending charge affected Mr. Hendrick's perceptions of Mozzetti's statements, and Mr. Hendricks actually admitted same [Tr. 10130], the court granted a protective order precluding not only reference to the nature of the charge but even the fact that he had been jailed on a felony charge. [Tr. 10180-10188].

Mr. Weidner attempted to cross-examine Mr. Hendricks to show the true nature of his conversations with Mr. Mozzetti were simply to the effect that Mr. Hendricks was very unhappy with his public defender representation and he wanted Mr. Mozzetti's assistance in helping him investigate Mr. Hendrick's case. [Tr. 10446]. Judge Ripley ruled that this was some violation of a "prior bad acts" order, and fined Mr. Weidner $500 refusing Mr. Weidner's request for a full hearing, an opportunity to defend himself, and actually fined Mr. Weidner pursuant to a bench conference when he had no opportunity to call witnesses or defend himself. [Tr. 10449].

Mr. Weidner was again fined $500 when he asked whether Mr. Hendricks was released on bail and who posted his bail and how much the bail was [Tr. 10451]. Mr. Weidner specifically objected to being forced to defend himself at a bench conference with no opportunity for independent counsel or to call witnesses, and specifically requested notice; nonetheless, the court fined him. [Tr. 10451].

Given the fact that Mr. Hendricks was evasive as to his true name and what the nature was of the charges for which he was arrested, it was necessary to have assistance in the defense investigation from the woman that initially filed the first degree sexual assault charges against him, one Dawn Marie Bach. When Mr. Hendricks was asked if he knew the woman seated in the courtroom in order to ascertain if she in fact was the same woman that had filed the charges against him to further counsel's investigation, Mr. Weidner was fined $500 despite the fact that he

again asked for independent counsel and a right to independently defend himself. [Tr. 10448].

The total fines imposed against petitioners were approximately $5,000.00 (five thousand dollars). Pursuant to AS 22.05.010, and AS.22.07.020, and the equal protection and due process clauses of the United States and Alaska Constitutions, petitioners appealed directly to the Alaska Supreme Court (see Consolidated Notice of Appeal, Exhibit E in Appendix herewith). Petitioners maintain that they have a right of direct appeal to the Alaska Supreme Court under the Alaska and Federal Constitutions, and any statute interposing a discretionary hurdle via the Alaska Court of Appeals is unconstitutional and a denial of due process and equal protection under the Fourteenth, Fifth, and Sixth Amendments to the United States Constitution, and the comparable provisions of the Alaska Constitution insofar as it applies to defense counsel in criminal cases, and does not apply to defense counsel in civil cases, and further does not apply to civil litigants.

Mr. Weidner also appealed the fundamental issues of an attorney's ability to defend himself and show cause why he should not be held in criminal contempt and/or sanctioned under Civil Rule 95 at the same time he is defending his client, where counsel's defense of himself may force counsel to violate attorney/client confidences, violate the client's right to remain silent and against self-incrimination under the state and federal constitutions, and violate the right to counsel provided by the state and federal constitutions (see Statement of Issues on Appeal, Exhibit F in Appendix herewith).

The Alaska Court of Appeals, in its decision dated November 25, 1988, rejected the federal equal protection and due process claims, based on unequal access to the Alaska Supreme Court by criminal attorneys sanctioned in trial court as opposed to attorneys in civil matters, by claiming that jurisdiction in the Alaska Court of Appeals bears a rational relationship to legitimate goals and that the right of an attorney to practice law is not

entitled to higher scrutiny. (Weidner v. State, 764 P.2d 717, 719-710 (Alaska 1988), (Exhibit B in Appendix herewith).

Furthermore, the Alaska Court of Appeals disposed of Mr. Weidner's arguments that he had a conflict of interest with his client which prevented him from defending himself at the same time that he was defending his client in court in that said defense by Mr. Weidner would violate his client's attorney/client privilege, his Fifth Amendment rights against self-incrimation, and his Sixth Amendment rights to effective assistance of counsel. The Court of Appeals stated:

> If Mr. Weidner had a good faith basis for his questions, or a valid reason for violating the court's restrictions, those justifications should have been presented at the time the sanctions were proposed. There was, therefore, no need for a separate post-trial hearing.(Weidner v. State, supra 764 P.2d at 722, Exhibit B in Appendix herewith).

The Alaska Court of Appeals also held that there was no constitutional right to a jury trial for the sanctions imposed on petitioners. Id.

Mr. Weidner filed a Petition for Rehearing on December 5, 1988, which was denied on January 5, 1989. Subsequently, a timely Petition for Hearing to the Alaska Supreme Court was filed,in which Mr. Weidner again raised the equal protection/due process denial of equal access by criminal defense counsel claim and the conflict of interest as violative of the Fifth and Sixth Amendments, and the constitutional right to a jury trial, independent counsel and other constitutional due process safeguards (Exhibit D in Appendix herewith). The petition was denied on May 1, 1989, and entered on May 3, 1989.

Given the specific objections at trial by petitioners, the specific Notice of Appeal and Statement of Issues at the Court of Appeals level, the specific references in the briefing, and the specific references in the Petition for Hearing to the Alaska Supreme Court as to the validity of the

rationalization by the Court of Appeals, the federal issues regarding the conflict of interest between petitioners and their client and the Fifth and Sixth Amendment defenses, as well as the equal access to the Alaska Supreme Court by criminal defense counsel under the Fifth and Fourteenth Amendments and the right of Mr. Weidner to jury trial and other constitutional protections have been properly preserved.

VI.

ARGUMENT

A. IT DENIES DUE PROCESS AND EQUAL PROTECTION TO INSIST THAT THE ALASKA COURT OF APPEALS HAS APPELLATE JURISDICTION WHILE THE ALASKA SUPREME COURT HAS APPELLATE JURISDICTION TO SIMILARLY SITUATED ATTORNEYS DEFENDING CIVIL LITIGANTS.

It is petitioners' position that the sanctions imposed against petitioners substantially threaten their right to practice law, which is a fundamental right under the United States and Alaska Constitutions, and accordingly, any discrimination between criminal defense counsel and civil counsel cannot be justified under the equal protection and

due process clauses of the Alaska and United States Constitutions absent a compelling basis. See Leeg v. Martin, 379 P.2d 477 (Alaska 1963); Alex v. State, 484 P.2d 677 (Alaska 1971); Isakson v. Rickey, 550 P.2d 359 (Alaska 1976); and Hiber v. Municipality of Anchorage, 611 P.2d 31 (Alaska 1980). Moreover, the more important the right, the greater the burden placed on the state to show that the classification which creates the discrimination has a fair and substantial relation to a legitimate government objective. See State v. Erickson, 547 P.2d 1 (Alaska 1978); Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255 (Alaska 1980); Plas v. State, 598 P.2d 966 (Alaska 1979).

A proper reading of AS 22.07.020 indicates that any direct appeal in this case lies with the Alaska Supreme Court, and further under AS 22.05.015 the Supreme Court should assume jurisdiction. Note that while counsel is being forced to appeal to the Alaska Court of Appeals over objection, his brothers under the Civil Bar may take a direct appeal to the Alaska Supreme

Court. See, e.g. Tobey v. Superior Court, 680 P.2d 782 (Alaska 1983). See also Diggs v. Diggs, 663 P.2d 950 (Alaska 1983); Johansen v. State, 491 P.2d 759 (Alaska 1971); c.f. State v. Browder, 486 P.2d 955 (Alaska 1971); and Surina v. Buckalew, 629 P.2d 969 (Alaska 1981).[3]

The Court's attention is directed to Zobel v. Williams, 475 U.S. 55 (1982); Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456 (1980); San Antonio School District v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16 (1973); Landesey v. Normet, 405 U.S. 56, 31 L.Ed.2d 36 (1972); Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397 (1976); Missouri v. Lewis, 101 U.S. 22

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[3]. The availability of malpractice insurance, that is, errors and omissions insurance, is a vital one to any private attorney in this day and age, and in fact is required by the Alaska Bar Association before one can be listed on the bar referral service. On application for errors and omissions insurance, it is necessary to list whether one has ever been disciplined by a court, and thus the summary sanctions constitute a clear and present danger to counsel's right to practice law. Thus, Mr. Weidner should have a right of direct appeal to the Alaska Supreme Court.

(1879); Mallett v. North Carolina, 181 U.S. 589 (1981); Colten v. Kentucky, 407 U.S. 104 (1972).

In short, while the above-referenced cases do authorize "two-tier systems" for adjudicating less serious cases, there is no rational basis and certainly no compelling state interest in discriminating against criminal defense attorneys and making them second class citizens merely because they happen to be defending litigants in criminal cases rather than civil cases.

In State v. Huse, 59 P.2d 1101 (Wa 1936), the Washington Court found that "the distinction giving rise to [a] classification must be germane to the purpose contemplated by the particular law and may not rest upon mere fortuitous characteristic or quality of persons, or upon personal designation."

In Brown v. Wood, 575 P.2d 760, 768 (Alaska 1978), modified, 592 P.2d 1250 (Alaska 1979), the plaintiff's showing that she was paid less than male colleagues for comparable work established a prima facie case of discrimination and thus shifted the

burden to the employer to show that the difference in pay was based on other considerations.

Similarly, here there is a showing that attorneys in civil cases have a right to direct appeal to the Alaska Supreme Court from sanctions while attorneys in criminal cases have a barrier of discretionary review interposed on them. Thus, attorneys in criminal matters are necessarily discriminated against by the courts where there is no justification for their separate classification. In fact, criminal cases are often much more serious than civil cases, and the obligation to defend criminal defendants is much more imposing, and thus attorneys representing criminal defendants should be subject to the equal protection of the Alaska Supreme Court.

Throughout its history, the United States Supreme Court has applied different tests to determine whether state legislation violates federal equal protection provisions. In recent history, the United States Supreme Court has applied two tests, commonly called the "compelling state interest

test" and the "rational relation test." The former test was reserved for legislation that affected a fundamental interest (right to travel and privacy) or a suspect classification (race or alienage) while the latter test was applied to all other classifications used in economic or social legislation. In the mid-1970s a middle layer of classification started to appear in Supreme Court decisions which was applied to important, but not quite fundamental, interests or suspect classifications.

In Rinaldi v. Yeaser, 384 U.S. 305, 310 (1966), the court stated:

> This court has never held that the states are required to establish appellate review but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

The civil versus criminal discrimination imposed here involves the fundamental right to practice law, i.e. the right to work and the right to life, liberty, and the pursuit of happiness, and therefore violates federal equal protection

guarantees unless the state can show a compelling state interest for the discrimination. Alternatively, the right involved is an important right to which the intermediate test should be applied. Finally, even if the minimum test is applied, there is no rational relation between the discrimination caused by the interposition of a barrier of discretionary review to criminal litigants and/or their attorneys and the purposes of the courts of appellate review.

When there are no valid distinctions between civil attorneys and criminal attorneys justifying the different appellate rights of review under the federal and state equal protection and due process analysis, the arbitrary banishment of criminal defense counsel to second class status must fail. Isakson v. Rickey, 550 P.3d 359 (Alaska 1976), State v. Erickson, 547 P.3d 1 (Alaska 1978).

B. IT IS INAPPROPRIATE TO FORCE COUNSEL TO DEFEND HIMSELF AT THE SAME TIME HE IS DEFENDING HIS CLIENT, AND FURTHER, IT IS INAPPROPRIATE TO FORCE COUNSEL TO VIOLATE THE CLIENT'S RIGHTS TO REMAIN SILENT AND AGAINST SELF-INCRIMINATION IN ORDER TO DEFND HIMSELF.

The basic thrust of most of the contempt citations was that counsel was being asked to provide a "good faith basis" for asking certain questions on cross-examination, despite the fact that to do so would clearly violate Mr. Mozzetti's rights to counsel and confidentiality of attorney/client communication, rights to remain silent and against self incrimination.

As recognized in Weidner v. Superior Court, 715 P.2d 264 (Alaska App. 1986), in many instances, courts should continue hearings with regard to purported contempt citations until the end of the trial so that counsel is not presented with this "Hobson's choice."

The opinion of the Alaska Court of Appeals that if Mr. Weidner had a good faith basis for his actions, he should have explained them to the judge at that time in defending himself, ignores the

crucial, essential issue in this Petition for Writ of Certiorari. That is, the conflict of interest that exists between the lawyer and his ability to defend himself without violating his client's Fifth and Sixth Amendment rights under the federal Constitution, as well as the corresponding clauses in the Alaska Constitution. In fact, this situation where Mr. Weidner, at the same time, must defend himself while representing his client is analagous to the situation where an attorney represents two defendants.

The authority which follows, addresses the standards upon which conflicts of interest should be reviewed in those conflicts caused by multiple representation. In Glasser v. United States, 315 U.S. 60 (1942), the United States Supreme Court held that an attorney's representation of two co-defendants whose interests were in conflict denied one of the defendants his Sixth Amendment right to effective assistance of counsel.

Thirty-five years later, in Halloway v. Arkansas, 435 U.S. 475 (1978), the United States

Supreme Court clarified Glasser. In Halloway, the trial court appointed the same counsel to represent three co-defendants. The trial court denied defense counsel's trial motions for appointment of separate counsel. Defense counsel claimed that because of confidential information received from co-defendants, he was confronted with a probable risk of representing conflicting interests and could not provide effective assistance for each of his clients. The Supreme Court reversed the trial court's denial of defense counsel's pre-trial motions for the appointments of separate counsel. Citing Glasser, the Supreme Court held that, "whenever trial court improperly requires joint representation over timely objections, reversal is automatic." Id. at 488.

The court also stated that:

> [An] Attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.

Id. at 485.

The Supreme Court noted that: "the defense attorney has the authorization to advise a trial court of conflict of interest." Id. at 485, 486. The court observed that attorneys are considered officers of the court. Id. at 486. The court further added; "When a considered representation regarding a conflict in client's interest comes from an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation." Id.

See also Smith v. Anderson, 689 F.2d 59 (1982). The court found these considerations persuasive in upholding the position that an attorney's request for the appointment of separate counsel on the basis of conflict of interest should be granted.

> In light of the attorney's duty to protect the confidentiality of his attorney/client relation, he need not fully explain [a conflict of interest situation] to the court, merely make the matter known to the court.

United States Ex Rel. Garrett v. Lane, 464 F.Supp. 793, 797 (1979).

> The rule developed by the federal courts in this area afford the trial attorney's judgment near decisive weight when counsel's perception of the conflict is brought to the court's attention.

Smith v. Anderson, supra, 689 F.2d at 62-63.

The Halloway court clarified the extent to which a defendant must show prejudice when he moves for separate counsel prior to trial on the basis of a conflict of interest.

> Under Halloway, courts must presume prejudice to the defendant, regarding of whether prejudice is shown independently, whenever the trial court improperly requires multiple representation over defendant's objection. Thus, Halloway rejected a requirement that a defendant establish prejudice in either of its senses: If a defendant makes a timely objection to the multiple representation, he need not show that a conflict created by the multiple representation reduced his attorney's effectiveness, or caused his conviction.

See Conflicts of Interest in the Representation of Multiple Criminal Defendants;

Clarifying Culyer v. Sullivan, 70 Georgetown Law Journal, 1527, 1533-34 (1982).

Prejudice was presumed in Halloway, even though the testimony of the jointly represented defendants contained no apparent conflicts. The Supreme Court noted several reasons why infraction of the defendant's right to the effective assistance of counsel should never be considered harmless error when a trial court has improperly disregarded defense counsel's representations regarding the existence of the conflict of interest. Halloway v. Arkansas, supra, at 489-91. The court noted that the harm caused by forcing a defendant's counsel to represent clients with possibly conflicting interests is often caused by what the attorney was forced to refrain from doing. In such situations, it is impossible for an appellate court to review a record and intelligently determine the impact of the conflict. An inquiry into a claim of harmless error in such a situation would require "unguided speculation". Id. at 491.

Thus, it was error for the court to require Mr. Weidner to represent himself at the same time that he had a conflict of interest with his own client. Mr. Weidner made timely objections to the trial court's attempt to force him to represent himself at the same time that he was representing his client. He brought to the attention of the court his inability to present his good faith basis for his actions which was necessary to defend himself, but which would have jeopardized his clients own rights under the Fifth and Sixth Amendments of the United States Constitution and corresponding provisions contained within the Alaska Constitution. Thus, Mr. Weidner requested a continuance of the sanctions against him until after the case against his client, independent counsel, and a hearing before a separate judge, so that he would not have to violate his own client's right. His objections and requests were denied by the trial court which summarily sanctioned him and these instances are cited in the statement of the case.

Thus, the court should have respected Mr. Weidner's assertion of a conflict of interest and stayed proceedings against Mr. Weidner until a later date. Up until the present time, Mr. Weidner has never been able to fully present his own defense against the sanctions imposed upon him. Note that the case against this client is still pending, presently by Habeas petition for Fifth and Sixth Amendment violations.

Asking Mr. Weidner to reveal the basis for his good faith belief in pursuing the line of questioning that he did at trial, was an attempt to undermine Mr. Weidner's client's Fifth Amendment right's against self-incrimination and Sixth Amendment rights to the effective assistance of counsel. Revealing that information, even in an in-camera hearing, would:

> Surrender the very protection which the privilege is designed to guarantee.

See Hoffman v. United States, 341 U.S. 479, 486 (1951).[4]

C. PETITIONERS SHOULD HAVE BEEN AFFORDED THE RIGHT TO A JURY TRIAL FOR CIVIL PENALTIES IMPOSED FOR A RETRIBUTIVE AND DETERRENT PURPOSE.

While the Court of Appeals characterized the majority of the sanctions as "civil", the clear intent was punitive and to punish for prior acts. See Wood v. Superior Court, 690 P.2d 1225 (Alaska 1984); Baker v. City of Fairbanks, 471 P.2d 286, 402 (Alaska 1970).

According to Baker, supra, the right to jury trial would extend to "offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of

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4. In Maness v. Meyers, 419 U.S. 449, 460 (1975), the court noted that "compliance could cause irreparable injury because appellate courts cannot always "unring the bell" once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error." Surrendering attorney-client privileges, Fifth Amendment and Sixth Amendment rights under the federal constitution, were surrendering the very protection which these privileges were designed to guarantee.

the term." Id. at 402. "A heavy enough fine might also indicate criminality because it can be taken as a gauge of the ethical and social judgments of the community". Id. at 402, n. 29.

The extreme nature of the fines and sanctions imposed constitute a serious imposition on counsel's professional reputation and ability to practice law. Wherever Mr. Weidner practices, the sanctions in this manner have been repeatedly used by the prosecutor to attempt to convince the court that Mr. Weidner is unethical. In addition, the availibility of malpractice insurance is vital to a practicing attorney, and may be jeopardized by the imposition of sanctions by the court. It is necessary to list whether one has ever been disciplined by a court in seeking to be listed on the Bar Association referral list. This too, presents a clear and present danger to the continued practice of law. Finally, the heavy imposition of fines could prevent an attorney from financially continuing to practice. Where the fines are so heavy that it can result in the loss of a valuable license, it is in effect, a

criminal prosecution which should result in the constitutional right to a jury trial. Alexander v. City of Anchorage, 490 P.2d 910 (Alaska 1971).

The trial judge imposed sanctions on defense counsel solely for retribution and deterrence. In U.S. v. Halper, 57 U.S.L.W. 4526 (United States Supreme Court file No. 87-1833 dated May 15, 1989), the court stated:

> Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves as the goals of punishment.
>
> These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. See. *e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not ligitimate non-punitive governmental objectives." *Bell v. Wolfish*, 441 U.S. 520, 539, n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or detterent purposes, is punishment,

> as we have come to understand the term. Cf. *Mendoza-Martinez*, 372 U.S., at 169 (whether sanction appears excessive in relation to its non-punitive purpose is relevant to determination of whether sanction is civil or criminal). We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Since the fines imposed against Mr. Weidner fall, under such an analysis, into "punishment" for "deterrence" and "retribution" and have a serious and permanent impact on the right to practice law, a jury trial and other protections should have attached.

VII.

SUMMARY AND CONCLUSIONS

The three questions presented by petitioners via Writ of Certiorari, are important fundamental issues involving important constitutional rights. In this case, the Court of Appeals of the state of Alaska and the Supreme Court of the state of

Alaska have refused to address the important constitutional question regarding a trial court forcing an attorney to defend himself at the same time that he is defending his client where the attorney's defense conflicts with the interest of his client and could violate his client's Fifth and Sixth Amendment rights under the United States Constitution.

The Alaska Supreme Court refused to accept the Petition for Hearing. Mr. Weidner, as an attorney representing a defendant in a criminal case was denied equal access in the appellate process to the Alaska Supreme Court. While civil attorneys have direct access, through a direct appeal from sanctions imposed to the Alaska Supreme Court, Mr. Weidner was only entitled to discretionary review. When an attorney is repeatedly sanctioned and excessive non-remedial, civil penalties imposed solely for retributive and deterrent purposes, the attorney is entitled to a hearing, independent counsel, and the right to a jury trial. Sanctions imposed against an attorney can impact

upon their ability to practice law, and it is invidious discrimination directed against criminal defense attorneys to deny them the same access to the Alaska Supreme Court. All attorneys should have equal access to the Alaska Supreme Court.

Accordingly, the court should grant the Petition for Writ of Certiorari and reverse.

Respectfully submitted this 31st day of August, 1989.

WEIDNER & ASSOCIATES, INC.
A Professional Corporation

By: Phillip Paul Weidner

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Anchorage, AK 99501
(907) 276-1200
Attorney for Petitioners

89-407

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, A Professional Corporation
Petitioners,

vs.

STATE OF ALASKA, SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

WEIDNER & ASSOCIATES, INC.
A Professional Corporation
PHILLIP PAUL WEIDNER
Attorney for Petitioners
330 L Street, Suite 200
Anchorage, AK 99501
(907) 276-1200

August 31, 1989

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EXHIBIT A.

ORDER OF THE SUPREME COURT OF THE STATE OF ALASKA DENYING PETITION FOR HEARING IN PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, A Professional Corporation v. STATE OF ALASKA; SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT, [SUPREME COURT FILE NO. S-3186] EFFECTIVE MAY 3, 1989.

IN THE SUPREME COURT OF THE STATE OF ALASKA

PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, a Professional Corporation,	) Supreme Court) No. S-3186
Petitioners,	)
v.	)
STATE OF ALASKA, SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT,	) Filed May 3) 1989
Respondents.	)

Court of Appeals No. A-420
Trial Court Nos. 3AN 83-870/6502 Cr.

ORDER

Before: Matthews, Chief Justice, Rabinowitz, Burke and Moore, Justices.*
[Compton, Justice, not participating]

On consideration of the petition for rehearing, filed on March 28, 1989, and the response to the petition, filed on April 12, 1989,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on May 1, 1989.

/s/ DAVID A. LAMPEN
Clerk of the Court of Appeals

*Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

EXHIBIT B

FINAL OPINION OF THE COURT OF APPEALS OF THE STATE OF ALASKA DENYING MERIT APPEAL IN PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, A Professional Corporation v. STATE OF ALASKA; SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT, [OPINION NO. 871, FILE NO. A-420, November 25, 1988, 764 P.2D 717].

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, a Professional Corporation,	
Appellants,	File No. A-420
v.	OPINION
STATE OF ALASKA, SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT,	[No. 871 - November 25, 1988]
Appellees.	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Phillip Paul Weidner, Drathman & Weidner, and William P. Bryson, Anchorage, for Appellants. Cynthia M. Hora, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Grace Berg Schaible, Attorney General, Juneau, for Appellee.

Before: Singleton, Judge, Compton, Justice,* and Greene, Superior Court Judge.* [Bryner, Chief Judge, and Coats, Judge, not participating.]

GREENE, Judge.

Attorney Phillip Paul Weidner was ordered to pay $4,650.00[1] as sanctions for alleged violations

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*Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

[1]The sanctions were imposed as follows:

July 28	$100 & $400	
August 2	$100 & $100	
August 16	$100	
August 17	$500	
August 24	$100	
August 26	$250	
September 6	$500	
September 13	$500	
September 14	$500	
September 21		$500 & $500 & $500

of court orders during his trial defense of the defendant in State v. Stumpf.[2]

During the three-month trial in State v. Stumpf, there were numerous incidents which led the trial judge, J. Justin Ripley, to admonish or sanction Weidner for violating court orders. There were at least eight such incidents prior to the time that the court began imposing monetary sanctions. The sanctions generally increased in amount as the trial continued. The first imposition of a sanction was under the authority of AS 09.50.010(5) for direct contempt. The remaining sanctions were imposed under Alaska Civil Rule 95(b). Weidner has appealed the sanctions; he challenges the jurisdiction of this court to hear this matter, alleges he received inadequate notice of the violations, contends that he was improperly denied a hearing and the right to counsel, and asserts that the trial

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[2]Stumpf's merit appeal was decided in Stumpf v. State, 749 P.2d 880 (Alaska App. 1988). That opinion may be consulted for additional facts regarding this case.

court's actions improperly infringed on his client's constitutional rights.

EQUAL PROTECTION/JURISDICTION

Weidner first argues that requiring him to bring his appeal in this court, rather than directly to the Alaska Supreme Court, denies him equal protection of the law under both the United States and Alaska Constitutions. U.S. Const. amend. XIV, §1; Alaska Const. art. I, §1. This claim is based on the fact that attorneys who are sanctioned in civil cases appeal directly to the supreme court, while attorneys who are sanctioned in criminal cases must first appeal to this court. Compare Stephenson v. Superior Court, 697 P.2d 653 (Alaska 1985), with Weidner v. Superior Court, 715 P.2d 264 (Alaska App. 1986). Equal protection analysis under Alaska law differs somewhat from the federal test. Therefore, Weidner's federal and state claims will be examined separately.

Under the federal standard, legislation which treats similarly situated people differently is only

subjected to heightened scrutiny if it relies on suspect classifications or burdens rights deemed fundamental. See Clements v. Fashing, 457 U.S. 957, 962-73 (1982). Where that is not the case, the classification need only bear a rational relationship to a legitimate goal. Id. at 963.

The United States Supreme Court has never held the right to pursue a particular occupation a fundamental right for equal protection purposes under the United States Constitution.

The Supreme Court has applied only the rational relationship test in resolving equal protection challenges to regulations on the legal profession. See, e.g., Schware v. Board of Bar Examiner of New Mexico, 353 U.S. 232, 239 (1957). The federal courts also apply the rational relationship test in addressing equal protection challenges to regulations affecting other professions. See Iacobucci v. City of Newport, 785 F.2d 1354, 1355-57 (6th Cir. 1986), rev'd on other grounds, _____ U.S. _____, 107 S.Ct. 383 (1986);

Lowrie v. Goldenhersh, 716 F.2d 1002, 1012 (5th Cir. 1978).

The Alaska legislature established the court of appeals in 1980 exclusively to hear criminal appeals. AS 22.07.020. The creation of the court of appeals served two purposes: (1) it ensured that the state court system had adequate resources to resolve the volume of appeals with which it is faced; and (2) it established an appellate court with an expertise and specialized body of knowledge in criminal matters which enables it to efficiently resolve criminal appeals. These are legitimate legislative purposes.

Requiring that an attorney sanctioned in criminal proceedings first present an appeal to the court of appeals is rationally related to these defined goals. The court of appeals has original jurisdiction to hear appeals from criminal proceedings. There is no appeal as of right from a criminal matter to the supreme court. AS 22.07.020; AS 22.05.010(b). The court of appeals therefore has primary

responsibility for resolving legal issues which arise in criminal proceedings. It reasonably follows that the court of appeals has developed familiarity with the normal course of criminal proceedings in this state. As the question of whether a given action merits sanction depends on the specific facts of a particular case, a sanctioned attorney will likely benefit from the court of appeals' specialized knowledge of standard practice in criminal matters in courts of this state. Additionally, as the court of appeals has primary responsiblility for establishing the controlling policies in criminal proceedings, it is rational to give this court primary responsibility for determining what practices are acceptable in those proceedings. Weidner has not established a violation of federal equal protection rights.

Weidner's claim under the state constitution fails for similar reasons. The Alaska Supreme Court has held that there is no fundamental right to pursue a specific occupation without hindrance. See Hilbers v. Anchorage, 611 P.2d 31, 40 (Alaska

1980); Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1262 (Alaska 1980). In resolving equal protection challenges brought under the Alaska Constitution, our courts apply a single standard involving a comprehensive examination of the circumstances. The statute's purpose must be legitimate; the means chosen to attain that purpose must substantially further that purpose; and the state's interest in the method chosen must be balanced against the right infringed. See Apokedak, 606 P.2d at 1264; State v. Erickson, 574 p.2d 1, 12 (Alaska 1978). Under this standard, Weidner's state equal protection challenge also fails. The statutory purpose and the means to attain the purpose, as discussed above, are reasonable exercises of legislative authority. The fact that sanctions in criminal cases are reviewed as a matter of right by three members of the appellate bench instead of five does not require a different determination.

Under the system of appellate practice created by the legislature, the only difference between the procedures applicable to a civil-law practioner who has been sanctioned and a criminal-law practitioner who has been sanctioned is the court of first review. The Alaska Supreme Court retains ultimate jurisdiction over matters of attorney admission and discipline. Any party who contends that any decision of this court regarding sanctions violates some general policy of the supreme court may present that argument through a petition for hearing. The Alaska Supreme Court, with its authority to grant discretionary hearing, is able to ensure that the decisions of this court are consistent with its policies and that no decision of this court regarding sanctions interferes with its powers to regulate the practice of law and attorney conduct.

ALLEGED INVALIDITY OF COURT ORDERS

Weidner alleges that several of the sanctions imposed were improper because the underlying orders were invalid. He argues that obeying them

would have entailed violating various of his client's constitutional rights. The validity of a court's order is not at issue in reviewing criminal contempt or sanctions under Civil Rule 95. Where a court has proper jurisdiction, its orders must be obeyed. A person may be punished for criminal contempt for violating a court's orders even if those orders are later found invalid. See Maness v. Meyers 419 U.S. 449, 458-60 (1975); United States v. United Mine Workers of America, 330 U.S. 258, 293-94 (1947). This rule has particular application to orders issued during trial. See Maness v. Meyers, 419 U.S. at 459. The trial judge must have the power to ensure that the proceedings are orderly and progress towards a conclusion. While counsel is entitled to establish an appellate record, that right does not include the right to violate the court's orders. If a trial judge errs, counsel must look to the appellate courts for relief from the order; counsel may not disregard or disobey the court's

orders. Weidner was not entitled to disobey the court's orders because he believed them incorrect.

ADEQUACY OF THE NOTICE AND HEARING

Weidner contends that he should have been given a post-trial hearing at which to defend himself against the contempt charges and that he received inadequate notice of which orders he allegedly violated. Judge Ripley imposed sanctions for direct contempt and additional sanctions under Alaska Civil Rule 95(b). The analysis differs based on the authority for the sanction.

No separate hearing is required where the sanction is imposed for actions constituting direct contempt committed in court in the trial judge's presence. See Weaver v. Superior Court, 572 P.2d 425, 429-30 (Alaska 1977); Alaska R. Civ. P. 90(a). On July 28, Judge Ripley specifically found Weidner in direct contempt and immediately imposed the penalty. Therefore, no hearing was required on that fine. Additionally, having reviewed the record, we find that notice was adequately given.

The other sanctions imposed in this case were imposed under authority of Alaska Civil Rule 95(b). Alaska Civil Rule 95(b) provides:

> In addition to its authority under (a) of this rule and its power to punish for contempt, a court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing by the court, if requested, impose a fine not to exceed $500.00 against any attorney who practices before it for failure to comply with these rules or any rules promulgated by the supreme court.

The rule applies in criminal matters. Weidner, 715 P.2d at 265. Although Alaska Civil Rule 95 (b) requires that a sanctioned attorney receive a hearing, the amount of notice, the amount of time for the attorney to prepare, and the extensiveness of the hearing required depend on the facts of the case. Where the facts are straightforward and there is no showing that a more extensive hearing is necessary to present other evidence, a brief hearing on short notice may satisfy Alaska Civil Rule 95(b) requirements. Stephenson, 697 P.2d at 655-57. The trial court has

considerable discretion in determining the time of the hearing under Alaska Civil Rule 95(b).

In this case, having reviewed the record, we conclude that the trial court did not abuse its discretion in requiring immediate hearings on these matters. In the present case, all of the sanctions imposed were imposed for in-court violations of Judge Ripley's orders. In almost every case, the sanctions were imposed for Weidner's persisting in behavior which the court warned him was improper. In each instance in which sanctions were imposed, Judge Ripley explained why he was considering imposing sanctions and offered Weidner the opportunity to explain his actions. Most of the sanctions were imposed either for violations of the court's order to make prior application before questioning witnesses regarding prior bad acts or for questioning in prohibited areas. If Weidner had a good faith basis for his questions, or a valid reason for violating the court's restrictions, those justifications should have been

presented at the time sanctions were proposed. There was, therefore, no need for a separate post-trial hearing.

A review of each instance in which a sanction was imposed reveals that in almost all cases the trial court did not abuse its discretion in imposing sanctions and was not clearly erroneous in it findings. However, in our judgment, three incidents require further proceedings in the trial court.[3]

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[3]On August 16, Judge Ripley imposed a $100 sanction for an alleged violation of his order requiring court approval before certain "bad acts" evidence was introduced. During the cross-examination of Dr. Probst, Weidner asked about the consistency of "heavy use of opium" with a finding in the autopsy of Mr. Yi, the victim. Weidner defended based on the fact that the order went only to witnesses and Yi was not a witness. The court's comments indicate its erroneous belief that the order was applicable beyond "witnesses." The state argues that the question violated Alaska Evidence Rule 404 (a)(2)(i) and thus the sanction should be affirmed. However, it is not clear whether Judge Ripley would have imposed a sanction for violation of that provision rather than his order. Judge Ripley should consider that question in the first instance.

JURY TRIAL

Weidner argues that he was entitled to a jury trial prior to the imposition of any of these sanctions. Clearly, he was not entitled to a jury trial prior to the imposition of sanctions under Alaska Civil Rule 95(b). See Weidner, 715 P.2d at 268. This

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On August 24, the court imposed a $100 sanction for asking a witness if she had been known as "Crazy Annie." The state applied for sanctions based on a violation of the "bad acts" order and Weidner's defense, to the extent one was raised, addressed that issue. While the trial court found no violation of the "bad acts" order, the trial court imposed sanctions for "degrading" the witness in violation of the rule which requires that questions not harrass or intimidate witnesses. Given these facts, Weidner was not given reasonable notice of the alleged violation.

On September 13, the court imposed a $500 sanction for asking the witness Andreas, without prior permission of the court, about his possession of burglary tools. Weidner requested permission to review the record because he thought "that was a pending charge." In light of the fact that the court's order specifically excepted "the existence of criminal charges currently pending against a witness" from its application, it was error to deny Weidner an opportunity to check the record and prepare his defense to the sanction.

necessarily follows from the fact that imprisonment is not authorized as a penalty for Alaska Civil Rule 95(b) violations. While a jury trial is required when incarceration is a potential punishment for an allegedly contemptuous act, a simple hearing is adequate when there is no threat ofimprisonment. Wood v. Superior Court, 690 P.2d 1225, 1233 (Alaska 1984), overruled on other grounds in DeLisio v. Superior Court, 740 P.2d 437, 439 (Alaska 1987); Weaver v. Superior Court, 572 P.2d 425, 431 (Alaska 1977); Continental Insurance Cos. v. Bayless and Roberts, Inc., 548 P.2d 398, 407 (Alaska 1976); Weidner, 715 P.2d at 268-69.

The analysis with respect to the single instance where Judge Ripley utilized his contempt powers differs from that applied to Civil Rule 95(b) situations. Whether a contemner is entitled to a jury trial turns on whether the purpose of the contempt proceeding is punitive (criminal) or merely coercive (remedial). Continental, 548 P.2d at 405. If the proceeding is merely coercive then no

jury trial is required because the contemner, even if incarcerated, holds the key to the cell in his or her pocket. E.L.L. v. State, 572 P.2d 786, 789 (Alaska 1977). See Johansen v. State, 491 P.2d 759, 764 (Alaska 1971). In contrast, if the purpose of the contempt proceeding is punitive (criminal) then the next step is to ask whether incarceration is a possible sanction. If the answer is yes, then a jury trial is required. See Continental, 548 P.2d at 405, 407. See also DeLisio v. Superior Court, 740 P.2d 437, 439 (Alaska 1987).[4]

On July 28, Judge Ripley found Weidner in direct contempt of his order to move on to other areas in cross-examining a witness, Trooper Olson, and imposed a fine of $100. Although Judge

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[4]In DeLisio, the court stated: "While it is true that a jury trial may be required when considering a criminal contempt, incarceration, per se, does not make the contempt criminal. '[T]here is no right to a jury trial in a civil contempt proceeding when the sole purpose of the proceeding is to compel the contemner to perform some act that he or she is capable of performing.'" 740 P.2d at 439 (citations omitted).

Ripley's comments illustrated a desire to deter future misconduct, the purpose of the sanction was clearly punitive.

Although the court was proceeding in criminal contempt, Weidner was not entitled to a jury trial. At the beginning of the hearing regarding the alleged contempt, the trial court specifically informed Weidner that "the issue [was] monetary sanctions and how much." Thus, there was no possibility of incarceration. See Johansen, 491 P.2d 766 n. 27 (whether criminal penalties may be imposed should be made clear at the outset of a contempt proceeding). Under AS 09.50.020, contempt under AS 09.50.010(5) for disobedience of a lawful court order may be punishable by a fine of not more than $300 or by imprisonment of not more than six months only when a right or remedy of a party to an action or proceeding was defeated. In all other instances, such contempt is punishable by a fine not to exceed $100. Judge Ripley was obviously proceeding under the latter remedy. We

conclude that the potential $100 fine in this case was not so heavy that Weidner was entitled to a jury trial. Resek v. State, 706 P.2d 288, 291-93 (Alaska 1985). We also conclude that Weidner was aware from the outset that potential fines would not be so large that a jury determination would be required. See Wood, 690 P.2d at 1232-33. Weidner was not subject to incarceration nor a fine in an excessive amount; he had no right to a jury trial for his direct contempt.

JUDICIAL CHALLENGE

Weidner argues that he should have been afforded a hearing before another judge on the question of sanctions. An individual facing imposition of sanctions such as these is not entitled to a change of judge as a matter of right. Where the totality of circumstances indicates that the judge is prejudiced against counsel, counsel has the right to challenge the judge for cause. Weidner, 715 P.2d at 269. Weidner has not established a basis for a cause challenge.

The imposition of sanctions is AFFIRMED, in part, and REMANDED, in part, to the superior court for further procedings consistent with this opinion.

EXHIBIT C

WRITTEN ORDER OF JANUARY 5, 1989, OF THE COURT OF APPEALS OF THE STATE OF ALASKA DENYING PETITION FOR REHEARING IN PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, A Professional Corporation v. STATE OF ALASKA; SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT, CASE No. A-420.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, a Professional Corporation,	Court of Appeals No. A-420
Appellants,	ORDER
v.	
STATE OF ALASKA, SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT,	
Appellees.	

Trial Court Nos. 3AN 83-870/6502 Cr.

Before: Singleton, Judge, Compton, Justice,* and Greene, Superior Court Judge.* [Bryner, Chief Judge, and Coats, Judge, not participating.]

On consideration of the petition for rehearing, filed on December 5, 1988,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Anchorage, Alaska on January 5, 1989.

/S/ DAVID A. LAMPEN
Clerk of the Court of Appeals

*Sitting by assignment made pursuant to article IV,
section 16 of the Alaska Constitution.

EXHIBIT D

PETITION FOR HEARING IN PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, A Professional Corporation v. STATE OF ALASKA; SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT, TO THE ALASKA SUPREME COURT, APPEAL NO. S-3186.

IN THE COURT OF APPEALS OF THE

STATE OF ALASKA

PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, a Professional Corporation,	)
Appellants,	)
v.	)
STATE OF ALASKA, SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT,	)
Appellees.	)

Court of Appeals No. A-420

PETITION FOR HEARING

I.

PRAYER FOR REVIEW

COMES NOW the Petitioners Phillip Paul Weidner and Drathman & Weidner, A Professional Corporation, by and through Phillip Paul Weidner and hereby Petitions this Court pursuant to Appellate Rule 301 et seq. to grant review of the Court of Appeals decision Opinion No. 871 dated November 25, 1988.

Attorney Phillip Paul Weidner was sanctioned on fourteen different occassions, once under the authority of AS 09.50.010(5) for direct contempt, and thirteen times under Alaska Rule 95(b) for a total of $4,650.00, while defending Daniel Mozzetti with regard to first degree murder charges. The prosecution and the trial court often reacted to Mr. Weidner's questions out of the mistaken belief that he was violating court orders with no good faith basis, when, in fact, he was asking said questions for other tactical and strategic reasons that they still do not comprehend, but were in fact, founded upon a good faith basis.

This case involves the fundamental issues of an attorney's ability to defend himself and show cause why he should not be held in criminal contempt and/or sanctioned under Civil Rule 95, at the same time he is defending his client, where counsel's defense of himself may force counsel to violate attorney-client confidences, violate the client's rights against self-incrimination under the state and federal constitutions. The Court of Appeals did not address these important constitutional concerns in its opinion.

The Petitioner also contends that the Court of Appeals acted without appellate jurisdiction in this case. Pursuant to AS 22.05.010, the Supreme Court has jurisdiction over civil matters. The civil sanctions pursuant to Civil Rule 95 are not criminal actions or proceedings in which the Court of Appeals has appellate jurisdiction under AS 22.07.020. Therefore, Petitioner's one appeal as a matter of right from the Superior Court's action was properly brought in the Supreme Court.

(Petitioner initially filed his appeal in the Supreme Court).

Secondly, discretionary review to the Supreme Court results in unequal treatment, as civil attorneys appeals of sanctions are directly appealed to the Supreme Court, and criminal defense attorneys appeals can only be heard in the Supreme Court through a discretionary Petition for Hearing. This distinction is unconstitutional under the state and federal constitutions as a denial of equal protection and due process.

Petitioner was also denied the right to a jury trial as provided in the state and federal constitutions. Several issues exist that were never addressed by the Court of Appeals. First, at what point does the cumulative amount of the fines imposed become heavy enough to denote criminality so as to warrant a jury trial. Second, may the trial court evade the constitutional requirements of a jury trial by imposing fines formally classified as civil under Civil Rule 95,

while in substance imposing fines intended as a punitive penalty, to punish the petitioner for "criminal conduct."

In at least one instance, the trial court sanctioned the petitioner for violating a court order after the trial court realized that the order was in error. Where an order is so modified to divest the prior acts of counsel of improper character, the trial court should not be allowed to sanction the conduct. The Court of Appeals did not correctly analyze or discuss this issue.

The Petitioner also contends that many of the trial court's orders were (1) sufficiently vague so that there was not willful violation of the trial court; (2) that there was specific notice of the sanctions contemplated; (3) that petitioner has the right to a hearing after final disposition of the criminal charges against his client; (4) that petitioner should have a hearing before a judge other than the trial judge; (5) that the trial court's order that petitioner present proposed questions in

cross-examination prior to the prosecution's direct examination violated the state and federal constitutional rights to confrontation and cross-examination and effective assistance of counsel; and (6) that the conduct complained of was not contemptuous, unprofessional or unethical and thus, the trial court abused its discretion in sanctioning petitioner.

The Petitioner therefore, requests that the court grant review.

II.

STATEMENT OF FACTS

Attorney Phillip Paul Weidner was sanctioned on fourteen separate occasions by the trial court, for a total of $465.00, while defending Daniel Mozzetti from first degree murder charges in State v. Mozzetti/Stumpf 3AN-83-870 Cr. These sanctions occurred between July 28, 1983, and September 21, 1983.

Sanction No. 1:

On July 28, 1983, the prosecution called State Trooper Greg Olson to testify concerning certain instructions Mr. Mozetti purportedly yelled to a witness while in the holding cells awaiting trial. The trial court erroneously refused to allow counsel access to a written police report in violation of Criminal Rule 16 and counsel objected to cross-examining the witness without the written statements. The trial judge specifically directed counsel to move along and leave the area and threatened to terminate cross-examination. The trial judge summarily terminated cross-examination and excused the witness over counsel's objection.

The trial judge then realized his error and allowed counsel access to the police report, realized his violation of Criminal Rule 16, and realized that the witness should not have been excused. Counsel was then able to develop significant "inconsistent" information in the police report crucial to cross-examination. Nontheless, the court fined counsel

pursuant to AS 09.50.010(5) $100.00 for direct contempt for the failure to "move along." The court denied counsel's request for a hearing before another judge.

Sanction No. 2:

The court had ordered that cross-examination as to character evidence be presented in writing beforehand. Carles Allen had testified that Sherry Schroeder had babysat for him. Counsel inquired of Mr. Allen about the drinking establishment, the "Moral Destiny," and Ms. Schroeder's activities therein. The prosecutor asked for sanctions as a violation of the court's order, which was denied.

A subsequent witness, Flabiano M. Macon, testified that he knew Ms. Schroeder only as a baby-sitter. Counsel asked Mr. Macon if he ever met her while she worked at the "Moral Destiny." Despite that fact that there had never been any prior specific orders precluding questions about Ms. Schroeder meeting Mr. Macon at the "Moral Destiny," and

that the court had allowed inquiries concerning Ms. Schroeder and the Moral Destiny earlier, the court fined Mr. Weidner $400.00 for violating the court's order.

The court refused to accept Mr. Weidner's representations that he had a good faith basis for asking the question and explanation that the question was relevant as to the ongoing relationship between Mr. Macon and Ms. Schroeder. The court refused to respect counsel's assertion that it would invade his attorney-client request for an independent hearing.

Sanctions No. 3 and 4:

Robert and Barbara Hester had numerous conversations with Mr. Mozetti. Some of these conversations had been recorded. The prosecutor conceded that none of the supposedly inculpatory statements were made on the tape recorded conversations. The prosecution obtained an order precluding defense counsel from cross-examining the witness, Barbara Hester as to statements made

by Mr. Mozetti which were exculpatory. The court ordered that cross-examination could be had only as to those conversations that the state opened up.

After cross-examination was complete, the prosecutor moved for sanctions claiming that counsel asking Ms. Hester whether she was trying to get Mr. Mozzetti to make admissions, and whether she was successful, violated the court's order. Further, a motion for sanctions were made as to counsel's inquity about Ms. Hester telling Mr. Mozzetti about the police coming around, alleging that there had been no prior offer of proof as to the conversations.

Counsel refused to defend himself at the same time he was defending his client, indicated he was in good faith, the orders were vague, and thus there was no specific notice, and he specifically requested a hearing.Counsel was fined $100.00 for each alleged violation.

Sanction No. 6:[1]

The witness, Gerald Parent, had allegedly sold the murder weapon to Mr. Mozetti. Mr. Weidner asked the witness whether the prosecution had promised not to prosecute Mr. Parent for hindering prosecution if he told the same version at trial that he told before the Grand Jury. The prosecutor filed for sanctions and the court subsequently fined counsel $500.00 for violation of Evidence Rule 103 without a right to a further hearing. The court did so in spite of the fact that a hearing had been held at which it came out that Mr. Parent had lied to police in an initial statement, and that Mr. Parent's attorney, believed, through conversations the same story at trial or at the Grand Jury proceedings.

Sanction No. 8:

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1. Sanction No. 5 (August 16, 1983); Sanction No. 7 (August 24, 1983); and Sanction No. 10 (September 13, 1983) were reversed or remanded for further proceedings and will not be discussed herein. See Court of Appeals decision, footnote 3.

The witness, William Dublin, was called as an alibi witness for one Donald Smith. The prosecutor obtained protective orders regarding alleged hearsay statements made by Mr. Smith to Mr. Dublin. Mr. Dublin said that Mr. Smith was his roommate and that they were in their home in Kotzebue on December 29 and 30. Counsel's questions were not intended to elicit statements for the truth of the matter asserted, but merely to test the witness' perceptions that it was the 29th and 30th. Counsel specifically indicated to the court the reason for examination of the statements and asked for a clarification of the court's order. Counsel was fined $250.00. Counsel asked for separate hearing, counsel, right to defend himself, and specific notice of objectionable questions. The court refused to give specific notice.

Sanction No. 9:

On September 6, 1983, counsel asked the victim's widow whether she had consulted an attorney about divorce action not long before the

victim's death. Counsel made a specific showing In Camera, but refused to reveal the name of the attorney who had revealed the specific representations. The Judge fined counsel $500.00 even though revealing the source would have left that attorney subject to legal action for disclosing confidences by the widow of the victim and jeopardized the source of the information.

Sanction No. 11:

On September 14, 1983, cross-examination of Investigator Grimes revealed that a witness whose testimony was damaging to the state was arrested right after the testimony. The prosecutor moved for $500.00 in sanctions, maintaining that there was no good faith basis to show that the arrest was linked to her testimony. Mr. Weidner asked for independent counsel, and ex parte in camera showing as to offer of proofs, and indicated that the prosecution was arresting witnesses harmful to them, while leaving others helpful to them to walk the streets free. The court claimed the question

violated the prior bad acts order and imposed $500.00 in sanctions.

Sanctions No. 12, 13 and 14:

On September 21, 1983, Mr. Weidner was fined $500.00 on three separte occasions during cross-examination of witness William Hendricks. William Hendricks testified to alleged incriminating statements Mr. Mozzetti made while Mr. Hendricks was in jail. Mr. Hendricks was in jail on a Class A felony of Sexual Assault in the First Degree which was later dismissed. Though the nature of the pending charges affected Mr. Hendricks perceptions of Mr. Mozzetti's statements, the court granted a protective order precluding reference to the nature of the change and even the fact that it was a felony charge.

The trial judge fined Mr. Weidner for violation of a prior bad acts order for attempting to show that the true nature of the conversations between Mr. Hendricks and Mr. Mozzetti was that Mr. Hendricks was unhappy with his public

defender and wanted Mr. Mozzetti's assistance to investigate Mr. Hendricks case. Mr. Weidner's request for a full hearing was denied and he was fined pursuant to a bench conference when he had no opportunity to call witnesses or defend himself.

The trial judge again fined Mr. Weidner for asking whether Mr. Hendricks was released on bail, who posted his bail, and how much the bail was. Again, there was no opportunity for independent counsel, even though specific objection was made and Mr. Weidner specifically requested notice.

Finally, when Mr. Hendricks was asked to identify the woman who had filed the sexual assault charge against him, Mr. Weidner was fined $500.00 despite the fact that he again asked for independent counsel and a right to independently defend himself.

III.

STATEMENTS OF POINTS RELIED UPON FOR REVERSAL

A. THE COURT OF APPEALS ERRED IN ITS ANALYSIS AS TO COUNSEL'S JUSTIFICATIONS AND THE NECESSITY FOR A SEPARATE HEARING.

The Court of Appeals Erred In Stating --

> If Mr. Weidner had a good faith basis for his questions, or a valid reason for violating the court's restrictions, those justifications should have been presented at the time sanctions were proposed. There was, therefore, no need for a separate post-trial hearing.

As to do so would violate Mr. Mozzetti's constitutional rights.

The Appellate Court failed to address the central issue of an attorney's ability to defend himself at the same time he is defending his client and thereby violating the right of confidentiality and the Fifth Amendment right against self incrimination.

In Maness v. Meyers, 419 U.S. 449, 460-61 (1975) the court noted that compliance with a court

order can "cause irreparable injury because appellate courts cannot always "unring the bell" once the information has been released." Id. at 460. See also McCracken v. Corey, 612 P.2d 990, 998 (Alaska 1980). The Alaska courts have recognized this problem faced by counsel in holding that in some instances a continuance should be granted until after the conclusion of the criminal proceedings against the client before a hearing and defense of the sanctions, in order for defense counsel to show cause without jeopardizing his client's rights. Weidner v. State, 715 P.2d 264 (Alaska 1986).

B. THE COURT OF APPEALS ERRED IN DETERMINING THAT IT HAD JURISDICTION.

If the actions for contempt and Civil Rule 95(b) sanctions against counsel were in the nature of civil proceedings, then the Court of Appeals, while having appellate jurisdiction over the criminal appeal of Mr. Mozzetti, had no

jurisdiction over the civil appeal of Mr. Weidner pursuant to AS 22.07.020 and AS 22.05.010.

Furthermore, civil counsel has a right of direct appeal to the Alaska Supreme Court. See Tobey v. Superior Court, 680 P.2d 782 (Alaska 1983). If criminal counsel is forced to appeal to the Alaska Court of Appeals, then review before the Supreme Court is merely discretionary pursuant to Appellate Rules 301 et sequel.

In Rinaldi v. Yeager, 86 S.Ct. 1497, 1500 (1966) the court stated:

> This court has never held that the states are required to establish appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

There are no valid distinctions between civil attorneys and criminal attorneys justifying the different appellate rights of review under the federal and state equal protection and due process analysis. Isakson v. Rickey, 550 P.2d 359 (Alaska 1976); State v. Erickson, 547 P.2d 1 (Alaska 1978).

C. THE ALASKA COURT OF APPEALS ERRED IN HOLDING THAT THE VALIDITY OF A COURT'S ORDER IS NOT AT ISSUE IN REVIEWING CRIMINAL CONTEMPT OR SANCTIONS UNDER CIVIL RULE 95.

The Court of Appeals held that the validity of the trial court's orders are not at issue. "Where a court has proper jurisdiction, its orders must be obeyed." Opinion at p. 7. However, the U.S. Supreme Court in Maness, supra, did hold that where compliance could cause irreparable damage to the client's rights, particularly important constitutional rights such as the right against self-incrimination, counsel need not comply and will not be accountable for sanctions if counsel's position is upheld on appeal. Maness, supra, 419 U.S. at 460-61. Therefore the Court of Appeals erred in holding:

> If a trial judge errs, counsel must look to the appellate courts for relief from the order; counsel may not disregard or disobey the court's orders. Weidner was not entitled to disobey the court's orders because he believed them incorrect.

Such a rule of law would have a chilling effect of the constitutional rights of criminal defendants, is contrary to the law (See Maness, supra) and improper if it leads to compliance with an order at the cost of the client's constitutional rights.

Second, in one instance, the trial court acknowledged that its earlier orders were in error. In 17 Am. Jur.2d Contempt, §48, (1964) it is stated:

> Where an injunction is so modified as to divest the prior acts of the defendant entirely of their illegal and improper character, an attachment for violation of the injunction may not be sustained.

Id. at 52.

Where the trial Judge acknowledged that it was in error, on July 28, 1983, and thus the actions of counsel were not improper, it was error to sanction the actions of counsel in that instance.

D. THE COURT OF APPEALS ERRED IN HOLDING THERE WAS NO RIGHT TO A JURY TRIAL.

While the Court of Appeals characterized the majority of the sanctions as "civil," the clear intent was punitive and to punish for prior acts. See Wood v. Superior Court, 690 P.2d 1225 (Alaska 1984); Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970).

According to Baker, supra, the right to jury trial would extend to "offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term." Id. at 402. "A heavy enough fine might also indicate criminality because it can be taken as a gauge of the ethical and social judgments of the community." Id. at 402, n. 29.

The extreme nature of the fines and sanctions imposed constitute a serious imposition on counsel's professional reputation. Furthermore, while in Wood it was held that no right to a jury trial attached under Civil Rule 95 (b), said fines were limited to $500.00, and in this case, if the Court

of Appeals decision is allowed to stand, a judge could repeatedly sanction counsel for each question. Thus, in essence, it could impose fines without limit and without a right to a jury or other procedural safeguard. In this case, Judge Ripley used civil contempt bases as an excuse to deny Mr. Weidner the procedural rights due for criminal contempt. See Weaver v. Superior Court, 572 P.2d 425 (Alaska 1977).

Furthermore, the Court of Appeals erred in:

(1) Denying counsel a right to a hearing. See Tobey v. Superior Court, 680 P.2d 782 (Alaska 1983);

(2) Denying a hearing before a judge other then Judge Ripley - especially where counsel had filed a preemptory challenge to Judge Ripley alleging bias before trial. Weidner, supra, 715 P.2d at 269.

(3) Determining that the trial judge's sanctions, except for one, were civil contempt based - as stated previously. The court used the civil

contempt powers to impose what were in effect criminal sanctions - SeeWeaver, supra; Baker, supra.

(4) Upholding the trial judge's summary findings of contempt as the conduct complained of was not contemptuous, unprofessional or unethical - People v. Kurz, 192 N.W. 2d 594, 598-99 (Mich. App. 1971); Harris v. U.S., 382 U.S. 162 (1965); In the Matter of Gorfele, 442 A.2d 934 (D.C. Cir. 1984). Furthermore, it must be clearly shown that the misbehavior actually and materially obstructed the judge in performance of judicial duties and that there was wrongful intent. In re Dellinger, 461 F.2d (7th Cir. 1972). Furtnermore, there must be a willful failure to comply with a court order. Johansen v. State, 491 P.2d 759 at 767 (Alaska 1971).

(5) In upholding the trial judge where the court's orders were sufficiently vague as to leave room for misunderstanding that the orders were being violated, thus, there was no willful failure to comply and furthermore, lack of notice. See

Johansen, supra: Continental Insurance Company v. Bayless & Roberts, 548 P.2d 398, 405 (Alaska 1976); Weaver, supra.

(6) Upholding the trial judge's sanctions when they were based on invalid court orders. As stated previously, in Maness, supra, where compliance will cause irreparable harm to a client's constitutional rights, counsel may disobey an order and will not be liable for sanctions if the court's order is held invalid on appeal. The trial judge erred in sanctioning counsel for failure to comply with orders that proposed questions or that cross-examination be presented prior to cross. This denies effective cross-examination under the 6th Amendment of the U.S. Constitution and Article I, Section II of the Alaska Constitution. See Davis v. Alaska, 415 U.S. 308, 315 (1974); Chambers v. Mississippi, 410 U.S. at 295.

In addition, the trial court improperly sanctioned counsel for cross-examining a witness in areas opened up on direct by the prosecution.

IV.

CONCRETE REASONS WHY ISSUES PRESENTED ARE OF IMPORTANCE BEYOND THIS PARTICULAR CASE AND WHY REVIEW SHOULD BE GRANTED PURSUANT TO APPELLATE RULE 304

A. The decision of the Court of Appeals is in conflict with state and federal constitutional principles, as well as being in conflict with other courts. The Court of Appeals held that an attorney must obey a court's orders without qualification. (Opinion page 7). This is in conflict with Maness v. Meyers, supra, 419 U.S. 449, 460-61, which recognized that in certain situations, counsel may disobey a court's orders and challenge its correctness, especially where a client's fundamental constitutional rights may be compromised. In addition, the Court of Appeals held that counsel should have defended himself during the trial, while Weidner v. Superior Court, 715 P.2d 264 (Alaska App. 1986) recognized that if counsel's defense of himself could jeopardize his client's

constitutional rights, a post trial hearing could be held.

B. The Alaska Court of Appeals decided that jurisdiction of criminal defense attorney sanctions is properly in the Court of Appeals and that it is not a denial of equal protection and due process to provide different appeal avenues for civil attorneys and criminal defense attorneys. This question has not been decided by the Alaska Supreme Court.

Furthermore, the Alaska Supreme Court has not decided at what point the fines levied against counsel are so heavy that constitutional procedure safeguard, such as jury trial, should be provided to counsel.

Also, important constitutional questions concerning (1) the ability of an attorney to defend himself without jeopardizing his client's rights; and (2) whether counsel is required to obey all court's orders, even if it violates his client's

constitutional rights, have not been addressed by the Alaska Supreme Court.

C. The Court of Appeals decided significant questions of law that have not been addressed by the Alaska Supreme Court. See § (a) and (b) supra.

D. A decision here will have significant consequences to others than the parties of the present case and is reasonably necessary to further the administration of justice.

The ability of counsel to fully and zealously represent his client, without jeopardizing the client's constitutional rights and to ensure a fair trial is at stake. Will counsel be forced to defend himself at the risk of his client's rights? Must counsel obey an order, which counsel considers incorrect, even if it will deprive his client of constitutional rights that cannot be remedied on appeal? Can the trial judge impose heavy fines and evade the procedural safeguards provided for criminal sanctions by imposing them, under the

civil sanctions rule and to intimidate counsel into foregoing client's rights against self-incrimination, effective assistance of counsel, and right of confrontation?

The serious ramifications and consequences to the concept of a judicial system which requires a vigorous independent bar as an indispensable part of the system of justice is not limited to this case and must not be ignored. See In re McConnell, 370 U.S. 230, 236 (1962).

For the reasons cited above, Petitioner requests that the Alaska Supreme Court grant the Petition for Hearing.

RESPECTFULLY submitted this 28th day of March, 1989.

/S/ MICHAEL COHN FOR
PHILLIP PAUL WEIDNER

EXHIBIT E

CONSOLIDATED NOTICES OF APPEAL TO THE ALASKA SUPREME COURT/ALASKA COURT OF APPEALS AS TO SANCTIONS OF DEFENSE COUNSEL DATED APRIL 20, 1984.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

DONALD STUMPF, a/k/a DANIEL MOZZETTI,

Defendants.

STATE OF ALASKA, Superior Court for the State of Alaska, Third Judicial District,

Plaintiffs/Appellees,

vs.

PHILLIP PAUL WEIDNER, and/or DRATHMAN & WEIDNER, a Professional Corporation,

Defendants/Appellants,

Case No: 3ANS 83-870 Cr.
(In Re: Any Applications for Sanctions as to Phillip Paul Weidner and/or Drathman & Weidner, a Professional Corporation)

CONSOLIDATED NOTICES OF APPEAL TO THE ALASKA SUPREME COURT/ ALASKA COURT OF APPEALS AS TO SANCTIONS OF DEFENSE COUNSEL

NOTICE is hereby given pursuant to Appellate Rule 204, and AS 22.05.010, AS 22.07.020, and Civil Rule 77, Civil Rule 95, Civil Rule 11, and the Rules of Procedure of the Alaska Bar Association with regard to discipline, that Drathman & Weidner, a Professional Corporation, and/or Phillip Paul Weidner, hereby appeal to the Alaska Supreme Court/Alaska Court of Appeals from the Orders entered by the Honorable J. Justin Ripley summarily fining counsel and making summary findings as to purported contempt of Court and/or violations of the Alaska Bar Disciplinary Rules, and further which assessed total sanctions in the approximate amount of $5,500.00.[1]

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1. In consideration of judicial economy, Defendants/Appellants are filing Consolidated Notices of Appeal with regard to the various orders, sanctions, findings of fact, and conclusions of law, appealed from. However, Defendants/Appellants maintain they have a right to independent counsel with regard to each separate appeal as to each separate sanction or order insofar as there may be

In further compliance with the applicable appellate rules and statutes the following is set out:

1. The parties taking the appeal are Drathman & Weidner, a Professional Corporation, and/or Phillip Paul Weidner.

2. The judgments or parts thereof appealed from are the sanctions imposed in open Court by Judge Ripley pursuant to motion by the prosecution on July 28, 1983, August 2, 1983, August 16, 1983, August 17, 1983, August 24, 1983, August 26, 1983, September 13, 1983, September 15, 1983, and September 21, 1983, and any purported findings of fact and conclusions of law made to support said sanctions.[2]

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different considerations involved with regard to same, and further have a right to file adequate briefing as to each order or sanction.

Thus, at the present time, while one appearance is being entered with regard to the consolidated appeals, further substitutions of counsel may be forthcoming with regard to the separate issues involved.

2. The instant Notices of Appeal are made pursuant to Appellate Rule 204(a)(6) which provides in pertinent part:

(6) Premature Appeals. If a notice of appeal is filed after the announcement of a decision but before the date shown in the clerk's certificate of distribution on the judgment, the notice of appeal shall be treated as filed on the date shown in the clerk's certificate of distribution on the judgment. (Emphasis added).

The initial Orders complained of were entered in open Court between the approximate dates of July 28, 1983 and September 21, 1983. A Stay was obtained as to all proceedings involving applications and/or Orders and/or appeals and/or motions to reconsider as to said sanctions until ten days after sentencing and final judgment, since given the ethical obligations and considerations involved, it was necessary for counsel to wait until Mr. Mozzetti was finally sentenced and an appropriate notice of appeal was filed on his behalf prior to filing an appeal on behalf of undersigned counsel and/or Drathman & Weidner, a Professional Corporation. The initial stay was obtained such that said matters would be stayed until ten days after verdict, and further, a written motion requesting a stay until ten days after sentencing and final judgment was filed on October 4, 1983. While the Order signed by Judge Ripley read that said stay was until January 23, 1984, said Order was entered when sentencing was set for January 13, 1984, and said sentencing was continued once due to the fact that the prosecutor was in trial in State v. Arnold on January 13, 1984, and another continuance was obtained pursuant to a request by the presentence officer on the grounds that extra

time was necessary for the presentence officer to complete the presentence report. Accordingly, final sentencing and judgment with regard to Mr. Mozzetti was not entered until March 22, 1984. Despite the fact that a written judgment was entered in a similar situation in State v. Main, Case No. 3ANS 82-8254, and In Re: Weidner and Drathman & Weidner, a Professional Corporation, and appeal was taken from said written judgment, no written judgment to date has been executed by Judge Ripley with regard to the sanctions in question such that the provisions of Appellate Rule 204(a)(1) with regard to the date shown in the Clerk's certificate of distribution of the Judgment do not yet apply. With regard to each of the sanctions in question, timely Motions to Reconsider were filed within ten days of the Court's ordering same in open Court, and accordingly since action by the Court with regard to said motions to reconsider were stayed until ten days after verdict and sentence, and further since Civil Rule 77 provides in pertinent part said motions are deemed denied within twenty days of the date of filing unless the Court acts with regard to same, the date on which said Motions to reconsider would be deemed denied would appear to occur on April 21, 1984, thirty days after sentence and judgment. In order to comply with both the thirty day provision of Appellate Rule 204(a) with regard to thirty days from the date of Mr. Mozzetti's final sentence and judgment and further in order to allow the Court twenty days after the expiration of the Stay in order to act with regard to the motion to reconsider, the instant notice of appeal is being filed contemporaneously with the Notice of Merit

3. The Court to which the appeals are taken are the Alaska Supreme Court/Alaska Court of Appeals.[3]

Appeal and Sentence appeal filed on behalf of Mr. Mozzetti.

3. Pursuant to AS 22.05.010 and AS 22.07.020, and the equal protection clause of the United States and Alaska Constitutions, and the right to due process under the United States and Alaska Constitutions, this appeal is taken directly to the Alaska Supreme Court. That is, Defendant/Appellants maintain thay they have the right of direct appeal to the Alaska Supreme Court under the Alaska Constitution, Article IV, Section 2, and any statute interposing a discretionary hurdle via the Alaska Court of Appeals is an unconstitutional denial of due process and equal protection under both the 14th and 5th Amendments to the United States Constitution and the comparable provisions of the Alaska Constitution insofar as it applies to defense counsel in criminal cases and does not apply to defense counsel in civil cases and further does not apply to civil litigants. A similar issue was raised sua sponte by the Alaska Supreme Court with regard to the appeal file in Phillip Paul Weidner and Drathman & Weidner, a Professional Corporation, Appellants, vs. Superior Court of the State of Alaska, Third Judicial District, Appellees, Supreme Court Case No. S-103, (In Re: Any Applications for Sanctions of Phillip Paul Weidner and/or Drathman & Weidner, a Professional Corporation), Superior Court Case No. 3ANS 82-8254 CR, and said appeal was transfered over objection to the Alaska Court of

Defendants/Appellants maintain they have a right to said appeal directly to the Alaska Supreme Court; however, if the Court will not entertain this notice to the Alaska Supreme Court, then the Defendants/Appellants appeal to the Alaska Court of Appeals over objection and continue to maintain they have said right.

In further compliance with the Rules of Appellate Procedure Statement of Points on Appeal, Designation of Records and Transcript Request Orders are filed herewith.[4]

Appeals. The pleadings filed by Defendant/Appellant in said matter are incorporated herein by reference as if fully set out. However, should the Court rule that jurisdiction for this appeal does not lie with the Alaska Supreme Court then this appeal is taken to the Alaska Court of Appeals, over objection, and Defendant/Appellants preserve their full rights to seek appropriate relief from the Alaska Courts or the Federal Courts with regard to the denial of equal protection and due process engendered by the discriminatory treatment of appeals of this nature as to counsel for criminal defendants as opposed to appeals from sanctions of counsel for civil defendants or appeals for civil litigants.

4. Note that it is the intent of Defendant/Appellants to appeal from all sanctions,

RESPECTFULLY SUBMITTED this 20th day of April, 1984.

/s/ PHILLIP PAUL WEIDNER

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findings of fact, and conclusions of law imposed. Insofar as the record in the instant proceeding is voluminous, (i.e., approximately three months of trial), and has not yet been transcribed, should a specific sanction order not have been fully designated, then said order will be supplemented with due diligence upon completion of a transcript.

EXHIBIT F

STATEMENT OF POINTS ON APPEAL AS TO SANCTIONS OF DEFENSE COUNSEL DATED APRIL 20, 1984.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

DONALD STUMPF, a/k/a DANIEL MOZZETTI,

Defendants.

STATE OF ALASKA, Superior Court for the State of Alaska, Third Judicial District,

Plaintiffs/Appellees,

vs.

PHILLIP PAUL WEIDNER, and/or DRATHMAN & WEIDNER, a Professional Corporation,

Defendants/Appellants,

Case No: 3ANS 83-870 Cr.
(In Re: Any Applications for Sanctions as to Phillip Paul Weidner and/or Drathman & Weidner, a Professional Corporation)

STATEMENTS OF POINTS ON APPEAL

COME NOW the Defendants/Appellants, Phillip Paul Weidner, and/or Drathman & Weidner, a Professional Corporation, and hereby state that they rely upon the following points on their appeals as to the above referenced matters:

1. The trial court erred in denying the Motions to Reconsider Orders with Regard to of Defense Counsel filed with regard to the sanctions of defense counsel, said Motions to Reconsider filed on August 3, 1983, August 17, 1983, September 1, 1983, September 19, 1983, and September 23, 1983.

2. The trial court erred in failing to grant the Defendant's Requests for a Jury Trial with regard to the sanctions at issue, said Requests for Jury Trial filed on August 3, 1983, August 17, 1983, September 1, 1983, September 19, 1983, and September 23, 1983.

3. The trial court erred in failing to grant the Defendant's Requests for Rights to Discovery, Argument, Confrontation, Cross-Examination and to Call Witnesses as to the sanctions at issue, said Requests filed on August 3, 1983, August 17, 1983, September 1, 1983, September 19, 1983, and September 23, 1983.

4. The trial court erred in failing to grant the Defendant's Requests for Rights to Discovery, Argument, Confrontation, Cross-Examination and to Call Witnesses as to the sanctions at issue, said Requests filed on August 3, 1983, August 17, 1983, September 1, 1983, September 19, 1983, and September 23, 1983.

5. The trial court erred in failing to grant appropriate Motions for Pre-Emptory Disqualification of Superior Court Judge, or in theAlternative Notice of Change of Judge filed with regard to the motions for sanctions at issue, said motions for per-emptory disqualification filed on

August 3, 1983, August 17, 1983, September 1, 1983, September 19, 1983, and September 23, 1983.

6. Mr. Weidner and Drathman & Weidner, a Professional Corporation, were never granted their full rights to a hearing, and/or to a jury trial, and/or to a hearing before a judge, and/or to a hearing before another judge, and/or to call witnesses, to confrontation and cross-examination, and/or to discovery, and/or to due process, and/or to the advice and assistance of independent counsel, and/or their own independent constitutional and statutory rights prior to the issuance by the Court of the purported findings and orders and sanctions.

7. Due to the fact that counsel was defending Mr. Mozzetti with regard to serious criminal charges, (first degree murder and hindering prosecution), at the time of the motions and orders complained of and since the facts and legal issues with regard to the State's motions for sanctions and the Court's findings as to sanctions

were intertwined with considerations which involved Mr. Mozzetti's rights to counsel, right to remain silent, rights against self incrimination, rights to confidentiality of the attorney/client privilege, right to cross examine and confront witnesses, right to call witnesses, right to discovery and to investigation, it was inappropriate to force counsel to take a detailed specific position with regard to the motion for sanctions or the Court's orders in that regard until representation had terminated as to the underlying criminal charges against Mr. Mozzetti and there had been a final disposition with regard to same. To do so violated the rights of Mr. Mozzetti and/or Drathman & Weidner, a Professional Corporation, and/or Phillip Paul Weidner as to counsel, to the confidentiality of the attorney/client relationship, to remain silent, against self incrimination, to call witnesses, to confrontation and cross examination, to a jury and/or court trial, to due process, and to practice law.

8. There was no direct contempt involved by the conduct of Mr. Weidner and any purported findings as to indirect contempt can only be made after the Court has followed all the constitutional, statutory and common law due process procedures with regard to said charges including appropriate hearing and/or jury trial and/or hearing before another judge, allowing the rights to call witnesses, to confrontatioon and cross examination, and/or to discovery, and/or to due process and/or the advice and assistance of independent counsel.

9. It would be unconstitutional and inaccurate to attempt to characterize the conduct of Mr. Weidner as direct contempt so as to deny all of the constitutional, statutory and common law rights including appropriate hearing an/or jury trial and/or hearing before another judge, allowing the rights to call witnesses, to confrontation and cross examination, and/or to discovery, and/or to

due process and/or the advice and assistance of independent counsel.

10. Insofar as any of the purported findings and orders purport to make any decisions and impose sanctions as to allegations concerning disciplinary rules of the Bar, the jurisdiction of this matter does not lie with the Superior Court but rather should have been referred to the Bar so that Mr. Weidner and Drathman & Weidner, a Professional Corporation could exercise their full constitutional and statutory and common law due process rights pursuant to said proceedings and further, any action with regard to purported violations of disciplinary rules are more properly before the Supreme Court after appropriate Bar proceedings.

11. There was no proper notice of purported Court Orders or charges, nor was there adequate notice as to any purported Orders violated, or notice of the nature of said alleged violations so as to enable counsel to defend against same.

12. After all the relevant facts are a matter of record, once Defendants/Appellants have had an adequate opportunity to defenda and exercise their full rights and further had said right to defend and exercise their full rights free from the constraint of ethical obligations due to the nature of the representation of Mr. Mozzetti, it will be apparent that there was no conduct by Mr. Weidner which amounted either to direct or indirect contempt and there were no violations of the Code of Professional Responsibility or the Bar Disciplinary Rules or any knowing or willful violation of any of the Court's valid Orders.

13. After all the relevant facts are a matter of record, once Defendant/Appellants have had an adequate opportunity to defend and exercise their full rights and further have had said right to defend and exercise their full rights free from the constraint of ethical obligations due to the nature of the representation of Mr. Mozzetti, it will be apparent that in light of the apparent circumstances

and facts, any order granting sanctions is not appropriate under the applicable Constitutional rights, statutes, and rules.

14. The Orders and sanctions were inappropriate since for counsel to have proceeded otherwise would have violated the defendant's rights to remain silent, against self incrimination, to effective assistance of counsel, to the confidentiality of the attorney/client relationship, to cross-examination and confrontation, to call witnesses, to discovery and to investigation, such that counsel's ethical obligations precluded him from proceeding otherwise.

RESPECTFULLY SUBMITTED this 20th day of April, 1984.

/S/ PHILLIP PAUL WEIDNER

EXHIBIT G

CERTIFICATE OF SERVICE BY MAIL

I hereby certify, that pursuant to Rule 21, Rule 28.2, Rule 28.5 (b), and Rule 33 of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the United States Supreme Court in good standing, and that three (3) copies of the foregoing Appendix to Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon counsel for the Respondent/Plaintiff by depositing same in the United States mail at Anchorage, Alaska, first class, postage pre-paid, addressed to:

Cynthia Hora
Assistant Attorney General
Office of Special Prosecutions and Appeals
1031 W. 4th Avenue, Suite 318
Anchorage, AK 99501

and further that three (3) copies of the foregoing Appendix to Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon

the Attorney General of the State of Alaska by depositing the same in the United States mail, at Anchorage, Alaska, first class, postage pre-paid, addressed to:

Douglas B. Baily
Attorney General
Box K
Juneau, AK 99811

DATED at Anchorage, Alaska, this ~~31st~~ 5th day of ~~August~~ September, 1989.

WEIDNER AND ASSOCIATES
Phillip Paul Weidner &
Associates, Inc.
A Professional Corporation

By: Phillip Paul Weidner
PHILLIP PAUL WEIDNER
330 L Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200
Attorney for Petitioners

(3)

No. 89-407

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

PHILLIP PAUL WEIDNER,
Petitioner,
vs.
STATE OF ALASKA,
Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

DOUGLAS B. BAILY
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: Cynthia M. Hora
Assistant Attorney General
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QUESTIONS PRESENTED

1. Under the Alaska Statutes governing the jurisdiction of appellate courts, an attorney sanctioned in a criminal case appeals the sanctions to the Alaska court of appeals, while an attorney sanctioned in a civil case appeals the sanctions to the Alaska supreme court. Does this statutory scheme violate equal protection or due process?

2. Can a judge impose sanctions on an attorney representing a criminal defendant upon finding that the attorney did not have a good faith basis for asking a question of a witness?

3. Does the judge's decision to sanction an attorney during trial create a conflict of interest between the attorney and his client?

4. Is an attorney entitled to a jury trial on whether he violated court orders and/or rules when the maximum penalty for each violation is $500?

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JURISDICTION

Weidner seeks discretionary review of four issues: (1) whether Alaska's statutory scheme regarding appellate jurisdiction violates equal protection and due process; (2) whether a judge can sanction an attorney who does not have a good faith basis for asking a question of a witness in open court; (3) whether the judge's decision to sanction Weidner during trial created a conflict of interest between Weidner and his client; and (4) whether Weidner was entitled to a jury trial. Weidner has properly invoked this Court's jurisdiction under 28 U.S.C. § 1257 with respect to issues (1) and (2). With respect to issues (3) and (4), it does not appear that Weidner presented these issues as federal questions in the state courts. This will be discussed more fully in the Argument section of the State of Alaska's response.

STATEMENT OF THE CASE

A. Introduction

This case arises out of the imposition of monetary sanctions by Alaska Superior Court Judge J. Justin Ripley against Anchorage attorney Phillip Paul Weidner for violations of court rules and orders which occurred during the three-month murder trial of Donald Stumpf. [1] Weidner violated court orders and rules on at least twenty-five separate occasions; Judge Ripley imposed monetary sanctions for fourteen of the violations. The sanctions, which varied in amount from $100 to $500, totalled $4650. The first violation for which a sanction was imposed was treated as direct criminal contempt under Alaska Statute 09.50.010(5). The remaining sanctions were imposed under Alaska Civil Rule

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[1] Stumpf's conviction was affirmed by that Alaska court of appeals. *Stumpf v. State*, 749 P.2d 880 (Alaska App. 1988). This Court denied Stumpf's petition for certiorari on May 15, 1989. See *Stumpf v. State of Alaska*, No. 88-6719.

95(b), which provides that a court may fine an attorney up to $500 for violating a court rule or order.

B. The Fourteen Violations of Court Orders and Rules

Weidner first violated a court order on the day jury selection began; he stood up when the jury panel came in, after being told by Judge Ripley that everyone was to remain seated whenever the jurors entered or left the court room. The second violation occurred the next day when Weidner asked a prospective juror a question which Judge Ripley had already told Weidner he could not ask. Judge Ripley was reluctant to impose monetary sanctions so early in the trial, choosing instead to admonish Weidner to abide by court rules and orders in the future.

Weidner continued to flagrantly violate court orders in spite of this and subsequent admonitions. He referred to bad acts of witnesses in violation of a pretrial order requiring the parties to make application to the court, outside the presence of the jury, before referring to prior misconduct of a witness; he also asked questions which Judge Ripley had ruled could not be

asked. The eighth time Judge Ripley found that Weidner had violated an order, the judge stated that he would consider imposing a sanction for that particular violation at the end of trial. Judge Ripley further warned Weidner that future violations would be dealt with at the time Weidner committed the violations. This warning was repeated after Weidner was found to have violated orders on three more occasions.

These warnings and admonitions were ineffective in deterring Weidner, and Judge Ripley decided to impose monetary sanctions for fourteen subsequent violations. These violations fell into five basic categories: (a) failing to abide by a pretrial order requiring Weidner to make application to the court, outside the presence of the jury, prior to referring to bad acts of witnesses [5 violations]; (b) failing to abide by evidentiary rulings by referring to evidence which had been ruled inadmissible [5 violations]; (c) asking questions for which he did not have a good faith basis [2 violations]; (d) failing to comply with Judge Ripley's repeated orders to cease cumulative examination of witnesses [1 violation]; and (e) asking a question designed solely to embarrass and harass a witness [1 violation].

The same procedure was followed for 13 of the violations. Shortly after Weidner violated a court order or rule, the prosecutor would ask Judge Ripley to sanction Weidner. Weidner would request a jury trial, and Judge Ripley would deny Weidner's request because the maximum penalty that could be imposed was $500. Then Judge Ripley would require an immediate explanation. On some occasions Weidner would give an explanation; on others, he would not. Judge Ripley would then make findings as to whether a rule or order was violated. If a violation was found, the judge would determine an appropriate monetary sanction.

Judge Ripley deviated from this procedure on one occasion. In that instance, the judge granted Weidner's request for an opportunity to consult with counsel before responding to the allegation.

C. The Appeals

Weidner appealed the fourteen sanctions in a single, consolidated appeal to the Alaska court of appeals. The court of appeals affirmed eleven of the fourteen sanctions (totalling $3950), and remanded for

further proceedings on the other three (totalling $700). *Weidner v. State*, 764 P.2d 717 (Alaska App. 1988).

Weidner petitioned the Alaska supreme court to review the decision of the court of appeals. The Alaska supreme court denied review, and Weidner has now petitioned this Court for a writ of certiorari to the Alaska court of appeals for review of its decision.

REASONS FOR DENYING THE WRIT

I. ALASKA'S STATUTORY SCHEME FOR APPELLATE REVIEW DOES NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS

The Alaska court of appeals has appellate jurisdiction over criminal prosecutions and other criminal-related matters, such as extradition, bail and post-conviction relief. AS 22.07.020. A party can seek discretionary review of a final order of the court of appeals by filing a petition for hearing in the Alaska supreme court. AS 22.05.010(d), AS 22.07.030. On the other hand, civil litigants whose cases commence in the superior court file their appeals directly with the supreme court. AS 22.05.010(b). Under this statutory scheme, an attorney sanctioned in a criminal case has his appeal heard by the court of appeals, while an attorney sanctioned in a civil case commenced in the superior court has his appeal heard by the supreme court. Because Weidner's sanctions were imposed in a criminal case, his appeal was heard by the court of appeals. This statutory scheme does not deny Weidner equal protection or due process under the Fourteenth Amendment to the United States Constitution.

In evaluating an equal protection challenge to legislation, a court must first determine whether the legislation involves suspect classifications or fundamental rights. Where fundamental rights or suspect classification are at issue, the legislation is subject to "strict scrutiny" and the state must show a compelling governmental interest. *See Shapiro v. Thompson*, 394 U.S. 618 (1969). If fundamental rights or suspect classifications are not involved, the legislation is upheld if the classifications drawn by the statute are rationally related to a legitimate state interest. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

Weidner asserts that Alaska's statutory scheme regarding appellate jurisdiction is subject to strict scrutiny because he has a fundamental right to practice law under the United States Constitution. Weidner's position is in conflict with this Court's decision in *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 239 (1957), which applied the rational relationship test to regulations imposed on the legal profession. *See also Matter of Roberts*, 682 F.2d 105, 108 n.3 (3rd Cir. 1982), and *Younger v. Colorado State Board of Law Examiners*, 625 F.2d 372, 377 n.3 (10th Cir. 1980), which

both held that a person does not have a fundamental right to practice law.

The Alaska court of appeals correctly applied the rational relationship test to the statutory scheme involving appellate jurisdiction and concluded that the legislation did not violate equal protection. The civil/criminal distinction was a valid one for the Alaska legislature to draw. The legislature created the court of appeals in 1980 to deal with criminal and related matters because of a need for specialized expertise in that tribunal. The area of criminal law had expanded and become more complex in the 20 years since Alaska's judiciary was created.

The court of appeals's ruling -- that the Constitution allows a state to establish a separate court to handle all aspects of criminal prosecutions -- is consistent with decisions of this Court dealing with equal protection challenges to jurisdictional statutes. In *Missouri v. Lewis*, 101 U.S. 22, 30 (1879), this Court stated equal protection "is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision[.]" Thus, a provision under which residents of certain counties appeal to a

court of appeals, while residents of other counties appeal to the state supreme court, does not violate equal protection. 101 U.S. at 33. *See also Mallett v. North Carolina*, 181 U.S. 589 (1901) (no denial of equal protection where the state can appeal a decision from the superior court of the eastern district, but not from the western district); *Ocampo v. United States*, 234 U.S. 91 (1914) (no denial of equal protection where the residents of rural areas enjoy the right to a preliminary hearing while city residents do not). [2]

The jurisdiction of the appellate courts of Alaska is determined by subject matter. The civil/criminal distinction passes constitutional muster.

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[2] Weidner suggests that a heightened level of scrutiny should apply to Alaska's statutes regarding jurisdiction of the state courts. Weidner cites no cases to support this proposition. This Court only applies "heightened scrutiny" in cases involving classifications based on sex or illegitimacy. *Kadrmas v. Dickinson Public Schools*, ___ U.S. ____, 108 S.Ct. 2481, 2487 (1988).

II. A JUDGE CAN SANCTION AN ATTORNEY FOR NOT HAVING A GOOD FAITH BASIS FOR A QUESTION

Judge Ripley sanctioned Weidner on two occasions for failing to provide a good faith basis for questions Weidner had asked on cross-examination. [3] On the first occasion, Judge Ripley found that Weidner did not have a good faith basis for asking the witness who had supplied Weidner's client with the murder weapon if the witness's attorney had told the witness that the witness wouldn't be prosecuted for hindering prosecution if the witness's trial testimony mirrored his grand jury testimony. On the second occasion, Judge Ripley found that Weidner did not have a good faith basis for asking the victim's widow about consulting with an attorney regarding a divorce from the victim. On both of these occasions, the judge gave Weidner the

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[3] Weidner is simply wrong when he asserts that "most" of the contempt citations were for his failure to provide a good faith basis for his questions. Only two of the fourteen sanctions involved findings that Weidner did not have a good faith basis for asking the questions he did.

opportunity to disclose the good faith basis for the question, but Weidner refused.

Sanctioning Weidner for not having a good faith basis for asking questions was proper. It is unethical for an attorney to "state or allude to any matter that he had no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence". See Alaska Disciplinary Rule 7-106(C)(1).

Further, requesting disclosure of Weidner's good faith basis did not violate his client's privilege against self-incrimination. A criminal defendant may be required to give pretrial notice of his intent to rely on an alibi defense. He may also be required to disclose the names and addresses of his alibi witnesses prior to trial. This disclosure does not violate the privilege against self-incrimination. *Williams v. Florida*, 399 U.S. 78, 83 (1970).

Disclosure of the names of witnesses who could provide admissible evidence to support the factual predicate of counsel's questions, like disclosure of the names and addresses of alibi witnesses, does not violate the Fifth Amendment.

III. THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE REMAINING TWO ISSUES

In his petition for writ of certiorari, Weidner asks this Court to decide whether sanctioning an attorney during trial creates a conflict of interest, thereby denying the client effective assistance of counsel. At no time in the state courts did Weidner make this argument. Before the Alaska supreme court, the issue was framed as a violation of the client's privilege against self-incrimination. (App. at pp. 40-41) There was no discussion about a potential conflict of interest under the Sixth Amendment. This being so, Weidner has not preserved any federal question and is not entitled to invoke the jurisdiction of this Court. *Webb v. Webb*, 451 U.S. 493 (1981).

With respect to the jury trial issue, Weidner did not cite any clause of the federal constitution in his petition for hearing to the Alaska supreme court. All of the cases cited and relied upon by Weidner in the state courts were state court decisions. (See Appendix, pp. 45-46) Weidner's failure to frame the issue as a federal question precludes review by this Court. *Webb*, *supra*.

IV. JUDGE RIPLEY'S DECISION TO SANCTION WEIDNER DURING TRIAL DID NOT CREATE A CONFLICT OF INTEREST

In *Sacher v. United States*, 343 U.S. 1, 11 (1952), this Court held that, when contemptuous conduct occurs in court, the judge has discretion to decide whether to impose sanctions immediately or wait until the end of trial. Judge Ripley's decision to impose sanctions during trial was proper. Weidner committed numerous violations of court orders before Judge Ripley decided to impose monetary sanctions during trial. The judge had repeatedly admonished Weidner and had warned him that disciplinary action would become necessary if Weidner persisted in his flagrant violations of the court's orders and rules. At one point, Judge Ripley indicated that he would consider the imposition of monetary sanctions at the end of trial. However, when it became clear that the threat of imposing sanctions at some future time did not deter Weidner, Judge Ripley determined that it had become necessary to begin imposing sanctions during the trial to maintain order and to deter Weidner from future contemptuous conduct.

Contrary to Weidner's assertion, Judge Ripley's decision to impose sanctions during trial did not create a conflict of interest. The cases cited by Weidner in his petition -- *Glasser v. United States*, 315 U.S. 60 (1942), and *Holloway v. Arkansas*, 435 U.S. 475 (1978) -- involve the representation of multiple criminal defendants by a single attorney. They do not involve the situation in this case. Weidner has an ethical obligation to defend his client zealously. But this obligation does not include the right to flagrantly disregard court orders and rules. As this Court made clear in *Sacher*, *supra*, 343 U.S. at 13-14, an attorney cannot "equate contempt with courage".

V. WEIDNER WAS NOT ENTITLED TO A JURY TRIAL

One of the $100 sanctions was imposed under Alaska's criminal contempt statute -- AS 09.50.010(5) -- which provides for a maximum penalty of $100. The remaining thirteen sanctions were imposed pursuant to Alaska Civil Rule 95(b), which provides for a maximum penalty of $500 per violation. This Court has held that a court can punish for criminal contempt without affording the contemnor a jury trial. *Taylor v. Hayes*, 418 U.S. 488, 495-96 (1974); *Green v. United States*, 356 U.S. 165, 183 (1958). This Court has also held that there is no right to a jury trial where the maximum punishment does not exceed $500. *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975). In *Muniz*, this Court upheld the imposition of a $10,000 fine violating a temporary injunction. Since the fines for each of Weidner's fourteen violations did not exceed $500, and since the total was less than $10,000, Weidner was not entitled to a jury trial.

CONCLUSION

Weidner's petition for writ of certiorari should be denied.

Respectfully submitted this 22nd day of November, 1989.

DOUGLAS B. BAILY
ATTORNEY GENERAL

Cynthia M. Hora
By: Cynthia M. Hora
Assistant Attorney General